(8)

No. 03-1293
Title: David Whitfield, Petitioner
v.
United States
Docketed: March 12, 2004
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (01-14746)
Decision Date: November 10, 2003
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jan 13 2004	Application (03A588) to extend the time to file a petition for a writ of certiorari from February 8, 2004 to March 8, 2004, submitted to Justice Kennedy.
Jan 14 2004	Application (03A588) granted by Justice Kennedy extending the time to file until March 8, 2004.
Mar 5 2004	Petition for a writ of certiorari filed. (Response due April 12, 2004)
Apr 7 2004	Order extending time to file response to petition to and including May 12, 2004.
May 12 2004	Brief of respondent United States in opposition filed. VIDED
May 25 2004	DISTRIBUTED for Conference of June 10, 2004.
Jun 1 2004	Reply of petitioner David Whitfield filed. (Distributed)
Jun 14 2004	DISTRIBUTED for Conference of June 17, 2004.
Jun 21 2004	Petition GRANTED The case is consolidated with No. 03-1294 and a total of one hour is allotted for oral argument.
Jul 19 2004	Extension of time within which to file the joint appendix and petitioners' briefs on the merits to and including August 25, 2004. VIDED
Aug 11 2004	Joint appendix filed . VIDED
Aug 20 2004	Motion for leave to proceed further herein in forma pauperis filed by petitioner.
Aug 25 2004	Brief of petitioners filed VIDED.
Aug 25 2004	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. VIDED.
Sep 1 2004	Motion DISTRIBUTED for Conference of September 27, 2004.
Sep 13 2004	Extension of time within which to file respondent's brief on the merits to and including October 19, 2004.
Sep 29 2004	SET FOR ARGUMENT ON Tuesday, November 30, 2004.
Oct 1 2004	CIRCULATED.
Oct 4 2004	Motion for leave to proceed further herein in forma pauperis GRANTED.
Oct 19 2004	Brief of respondent United States filed. VIDED.
Oct 28 2004	Record received from U.S.C.A. - 11th Circuit. (1 envelope)
Nov 3 2004	Record received from U.S.D.C. - Middle Dist. of Florida (10 boxes - 1 sealed envelope included)
Nov 22 2004	Reply of petitioner David Whitfield filed. VIDED. (Distributed).
Nov 30 2004	Argued. For petitioners: Sharon C. Samek, Tampa Fla. (Appointed by this Court.) For respondent: Jonathan L. Marcus, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

(1)

No. 03129

In The

Supreme Court of the United States

DAVID WHITFIELD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID WHITFIELD
P.O. Box 1031
Coleman, FL 33521-1031

Petitioner

QUESTIONS PRESENTED

1. Whether commission of an overt act is an essential element of a conviction under 18 U.S.C. § 1956(h), conspiracy to commit money laundering?

2. Whether the Supreme Court should resolve the split between the federal circuit courts on the issue of whether an overt act is an essential element of a conviction under 18 U.S.C. § 1956(h)?

3. Whether the district court abused its discretion in omitting an "overt act" element from its instruction on money laundering conspiracy?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, DAVID WHITFIELD ("Mr. Whitfield"), respectfully prays for a writ of certiorari to review and reverse the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above referenced matter on November 10, 2003.

OPINIONS BELOW

The published opinion of the Eleventh Circuit Court of Appeals affirming Mr. Whitfield's money laundering conspiracy conviction on direct appeal is reproduced in Appendix A hereto and reported at *United States v. Hall*, 349 F.3d 1320 (11th Cir. 2003). The unpublished opinion of the Eleventh Circuit affirming all other counts of conviction as to Mr. Whitfield on direct appeal is reproduced in Appendix B hereto. The mandate issued by the Eleventh Circuit is reproduced in Appendix C. The judgment and commitment order entered by the United States District Court of the Middle District of Florida – TAMPA DIVISION, dated August 9, 2001, is reproduced in Appendix D.

JURISDICTION

The Court's jurisdiction is invoked pursuant to Title 28 U.S.C. § 1254(1). This petition presents this Court with a serious constitutional question as well as a conflict with decisions of the federal appellate and circuit courts as more fully presented below. The questions to be resolved center around whether an overt act is an essential element of a conviction under 18 U.S.C § 1956(h), money laundering

conspiracy statutes. The instant petition is filed timely and within the 90-day statutory time limitation period.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION: FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual services in time of war or public danger; nor shall any person be subject for the same offense twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

TITLE 18 U.S.C., SECTION 1956(h)

Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

STATEMENT OF CASE

I. Procedural History.

On March 10, 1999, a federal grand jury sitting in the Middle District of Florida indicted Mr. Whitfield,

HAYWOOD "DON" HALL ("Mr. Hall") and others for conspiracy to defraud, in violation of 18 U.S.C. § 371 (Count One); money laundering conspiracy, in violation of 18 U.S.C. § 1956(h) (Count Two); mail fraud, in violation of 18 U.S.C. §§ 1341 and 2 (Counts Three through Seven); money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(i) (Counts Eight through Twelve); and conducting unlawful monetary transactions, in violation of 18 U.S.C. §§ 1957 and 2 (Counts Thirteen through Seventeen). Mr. Whitfield, Mr. Hall and several others pled not guilty and the case proceeded to trial by jury.

At the conclusion of the jury trial, all defendants moved for entry of a judgment of acquittal. The district court below granted the motion as to Count Five and denied it as to all other counts. On March 13, 2001, the jury returned guilty verdicts against Mr. Whitfield on Counts One through Four and Six through Seventeen. Mr. Hall was found guilty on Counts One, Two, Four, Six, and Seven. On August 9, 2001, the district court sentenced Mr. Whitfield to 235-months imprisonment and 3-years supervised release. On November 5, 2001, the district court entered an amended judgment and commitment order reflecting a determination of restitution in the amount of $85,030,412.00, to be paid jointly and severally by all defendants who went to trial, including Mr. Whitfield. He timely filed his notice of appeal from the amended judgment and commitment order entered by the district court below.

On November 10, 2003, the Eleventh Circuit Court of Appeals entered its decision in affirming the convictions of all defendants and vacating Mr. Hall's sentence and remanded to the lower court for further proceedings consistent with its opinion. *See, United States v. Hall*, 349

F.3d 1320 (11th Cir. 2003); App. A. The Eleventh Circuit issued a separate unpublished opinion regarding other issues raised by Mr. Whitfield and the other defendants. *See,* App. B.

On January 14, 2003, this Court granted Mr. Whitfield an enlargement of time to and including March 8, 2004, to file the instant petition. *See*, App. E. Mr. Whitfield is currently serving his federal sentence at FCC-Coleman (LOW), a federal correctional institution located in Coleman, Florida. The custodian is B. PEARSON, Warden.

II. Facts.

In 1993, Greater Ministries International, Inc. began running a "gifting" program, representing to potential "giftors" that they could double their "gifts" within seventeen months. Under the program, individuals "gifted" money to the Church in increments of $250. In return, over 17-months, the "giftor" was to receive a "giftback" of $500 for each $250 "gift." In 1997, Mr. Whitfield served as an executive board member and handled the day-to-day operations, along with other defendants, of Greater Ministries International Church ("GMIC"). Mr. Whitfield was an elder and had an office at GMIC headquarters. He initially was in charge of data entry of "gifting" certificates and the monies. Although there were disclaimers on the "gifting forms" stating that there were no guarantees of a return, the defendants expressly or impliedly promise giftbacks. GMIC took a loss of $20,000,000.00 on deposit with Best Bank financial institution, in July 1998 when it was taken over by the F.D.I.C. After that time, many investors received little or no return on their gifts. Mr. Whitfield received as "gas money" five percent commission of all money gifted or

re-gifted by an investor recruited by Mr. Whitfield. Over the course of the gift program, Mr. Whitfield received more than $678,000.00 in cash. GMIC was placed into bankruptcy in 1999. During the course of the bankruptcy proceedings, the bankruptcy trustee claimed that the gifting program executed by GMIC took in over $400,000,000.00.

At the conclusion of the jury trial, Mr. Whitfield, along with his co-defendants, requested that the jury be instructed that the commission of an overt act was an element of the money laundering conspiracy statute, 18 U.S.C. § 1956(h) under Count Two. The district court, over the defendants' objection, refused. The jury returned a guilty verdict under Count Two as to all defendants, including Mr. Whitfield.

On appeal, the Eleventh Circuit, recognizing a definitive split in the federal circuits on the issue whether an overt act was an element of § 1956(h), held that an overt act was not an element of that particular offense, § 1956(h). In so doing, the Eleventh Circuit held the trial court did not abuse its discretion in omitting an overt act element from the jury instruction for Count Two of the indictment. The instant petition followed, seeking this Court's intervention in order to resolve the split amongst the federal circuit courts on the aforementioned question of law.

REASONS FOR GRANTING THE PETITION

The Petitioner, Mr. Whitfield, respectfully submits that the Eleventh Circuit's holding that an "overt act is not an essential element for conviction of conspiracy to commit money laundering[,]" 349 F.3d 1324, was wrongly

decided as well as creating a definitive split amongst the federal circuit courts.

The Eleventh Circuit, relying on this Court's decision in *United States v. Shabani*, 513 U.S. 10, 115 S.Ct. 382 (1994), determined that the money laundering conspiracy statute, 18 U.S.C. § 1956(h), did not specifically call for an overt act requirement; thus, none was required to be proved as an "essential element for conviction of conspiracy to commit money laundering." *Hall*, 349 F.3d at 1323-24. In reaching this conclusion, however, the Eleventh Circuit noted "other circuits are split on the issue." 349 F.3d at 1323.

The appellate court below further held:

> While neither this Court nor the Supreme Court has determined whether commission of an overt act is an essential element of a conviction under § 1956(h), other circuits are split on the issue. *See, United States v. Godwin*, 272 F.3d 659, 669 n. 9 (4th Cir. 2001) (noting that 18 U.S.C. § 1956(h) does not explicitly require proof of an overt act); *United States v. Tam*, 240 F.3d 797, 802 (9th Cir. 2001) (finding that § 1956(h) does not require the indictment to allege an overt act). *But see, United States v. Wilson*, 249 F.3d 366, 379 (5th Cir. 2001) (finding proof of an overt act is required for a conviction under § 1956(h)); *United States v. Hildebrand*, 152 F.3d 756, 762 (8th Cir. 1998) (finding that § 1956(h) required proof of an overt act for conviction).

Those circuits courts that have found § 1956(h) to require proof of an overt act have relied on case law interpreting the general conspiracy statute

> of 18 U.S.C. § 371. *See Wilson*, 249 F.3d at 379; *Hildebrand*, 152 F.3d at 762.

Hall, 349 F.3d at 1323.

Although the Eleventh Circuit recognized the split, its list was not all inclusive; that is, another federal circuit has consistently held that an overt act was an essential element for conviction of conspiracy to commit money laundering. *See*, *United States v. Conley*, 37 F.3d 970, 976 (3rd Cir. 1994) and *United States v. Rankin*, 870 F.2d 109, 113 (3rd Cir. 1989).

In *Conley*, the Third Circuit concluded:

> In order to prove conspiracy to commit money laundering, the government must establish the following three essential elements: (1) the conspiracy, agreement, or understanding to commit money laundering was formed reached, or entered into by two or more persons; (2) at some time during the existence or life of the conspiracy, agreement, or understanding, one of its alleged members knowingly performed one of the overt acts charged in the indictment in order to further or advance the purpose of the agreement; and (3) at some time during the existence or life of the conspiracy, agreement, or understanding, the defendant knew the purpose of the agreement, and then deliberately joined the conspiracy, agreement or understanding.

Conley, 37 F.3d at 976 (citing *United States v. Rankin*, 870 F.2d 109, 113 (3d Cir. 1989)). A panel in the Tenth Circuit agreed with the majority circuits on this issue and concluded that an overt act under the money laundering statute was an essential element for conviction of conspiracy to commit money laundering. *See*, *United States v.*

Hand, 1995 WL 743841, 76 F.3d 393 (10th Cir. 1995) (To prove a 18 U.S.C. § 1956(h) conspiracy, the government must prove: (1) the existence of an agreement; (2) to break the law; (3) an overt act; (4) in furtherance of the conspiracy's object; and (5) that a defendant willfully entered the conspiracy).

While the Eleventh Circuit in this case felt "compelled to follow the Supreme Court's reasoning in *Shabani*[ ]" in rejecting Mr. Whitfield's claim that the money laundering statute required proof of an overt act, other federal circuits, the majority of which have sided with Mr. Whitfield on this most important issue. In fairness to the Eleventh Circuit, the compelling aspect of the decision in *Shabani* was this Court's statement:

> [W]e find it instructive that the general conspiracy statute, 18 U.S.C. § 371, contains an explicit requirement that a conspirator "do any act to effect the object of the conspiracy." In light of this additional element in the general conspiracy statute, Congress' silence in [21 U.S.C.] § 846 speaks volumes.

Shabani, 513 U.S. at 14, 115 S.Ct. 382. Yet in reaching the opposite conclusion of the Eleventh Circuit in *Hall*, the other federal circuit courts applied the general conspiracy statute, 18 U.S.C. § 371. It is axiomatic that this Court should resolve the split amongst the federal circuits, or so Mr. Whitfield respectfully opines. Of course, as argued in the appellate court below, Mr. Whitfield submits that the Third Circuit's decision in *Conley* and *Rankin*, *supra*, the Fifth Circuit's decision in *Wilson*, *supra*, the Eighth Circuit's decision in *Hildebrand*, *supra*, and the Tenth Circuit's decision in *Hand*, *supra*, were all correctly decided, which this Court should affirm. The questions

presented here are purely issues of law which are being answered and applied differently throughout this country. In some circuits, in the absence of proof of an overt act, the conviction for conspiracy to commit money laundering cannot stand. On the other hand, if the defendant is charged in the Eleventh Circuit, for example, the government is not required to prove an overt act as an essential element for conviction of conspiracy to commit money laundering. *Hall*, 349 F.3d at 1324. This lack of uniformity in the law as applied to criminal defendants is a matter which deserves the attention of and resolution by this Court – nothing less. When considering the integrity of the criminal justice system, the government and the courts "should not be permitted 'to blow hot and cold'" on this issue. *Ohler v. United States*, 529 U.S. 753, 120 S.Ct. 1951, 1856 (2000) (Souter, J., dissenting), by reinterpreting the money laundering conspiracy statute.

As to the claim that the district court erred in intentionally omitting, over Mr. Whitfield's objection, the overt act element from the § 1956(h) jury instruction, this Court has set forth the standard to be applied in cases like the one now before the Court. The test is whether it appears beyond a reasonable doubt that the error did not contribute to the defendant's conviction. *Chapman v. California*, 386 U.S. 18 (1967). Should this Court determine that the government was required to prove an overt act as an essential element for conviction under the money laundering conspiracy statute, the trial record reveals there is a substantial likelihood that the erroneous jury instruction aforementioned confused the jury. For the reasons stated above, Mr. Whitfield respectfully submits that this Court

should and must resolve the split in the federal circuits on this most important criminal matter.

CONCLUSION

WHEREFORE, the Petitioner, DAVID WHITFIELD, requests this Court to grant the instant petition for writ of certiorari, vacate the judgment of the Eleventh Circuit, and reverse his conviction for conspiracy to commit money laundering. Mr. Whitfield further requests other relief this Court deems proper and just.

Respectfully submitted,

DAVID WHITFIELD
P.O. Box 1031
Coleman, FL 33521-1031

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-14746

D.C. Docket No. 99-00078-CR-T-25F

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GERALD PAYNE,
BETTY PAYNE,
PATRICK TALBERT,
DAVID WHITFIELD,

Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Florida

(November 10, 2003)

Before BLACK and FAY, Circuit Judges, and HUCK*, District Judge.

* Honorable Paul C. Huck, United States District Judge for the Southern District of Florida, sitting by designation.

PER CURIAM:

Defendants Gerald Payne, Betty Payne, David Whitfield ("Whitfield"), and Patrick-Henry Talbert ("Talbert") were convicted of mail fraud conspiracy, in violation of 18 U.S.C. § 371; money laundering conspiracy, in violation of 18 U.S.C. § 1956(h); mail fraud, in violation of 18 U.S.C. § 1341; money laundering, in violation 18 U.S.C. § 1956(a)(1)(A)(i); and conducting unlawful monetary transactions, in violation of 18 U.S.C. § 1957.[1] In addition, Defendant Gerald Payne was also convicted of unlawfully structuring financial transactions, in violation of 31 U.S.C § 5324(3). These convictions were based on government allegations that these co-defendants, as principals in Greater Ministries International Church (GMIC), managed and promoted a fraudulent investment scheme.

Defendant Gerald Payne initially incorporated GMIC and began to use this "church" as a vehicle to defraud investors by setting up a "gifting" program, which the other co-defendants eventually became involved in. Under the program, investors would "gift" money to GMIC in increments of $250 and within 17 months the "giftors"

[1] Two other original co-defendants, James R. Chambers and Andrew J. Krishak, accepted plea agreements for their role in the crime. Additionally, one other co-defendant, Haywood Eudon Hall, was convicted of mail fraud conspiracy, money laundering conspiracy, and mail fraud. We have written an opinion discussing two of Hall's challenges: (1) whether proof of an overt act is necessary for a money laundering conspiracy conviction under 18 U.S.C. § 1956(h); and (2) whether an abuse of trust sentencing enhancement was proper under U.S.S.G. § 3B1.3. Accordingly, although we are aware that some of the other co-defendants have adopted Hall's first challenge, we do not further discuss this issue here.

were to get back double their money in the form of "giftbacks." Although there were disclaimers on the "gifting forms" stating that there were no guarantees of a return, the defendants expressly or impliedly promised giftbacks. Notwithstanding the defendants' promises of large amounts of money, many investors received little or no return on their gifts. When giftors inquired about their money, the defendants employed stalling techniques. In contrast, each director received monthly "gas money," which was a five percent commission of all money gifted or re-gifted by an investor recruited by that director. All gas money was paid in cash by Defendant Gerald Payne, and over the course of the fraud, he received more than $310,000 of this money, while Defendant Whitfield received more than $678,000, and Defendant Talbert received more than $609,000.

These co-defendants now raise various challenges to their convictions and sentencing. First, as to Defendant Gerald Payne, he claims that he was effectively precluded from testifying on his own behalf due to the district court's failure to apply the proper weighing test in ruling that his prior conviction was admissible under Federal Rule of Evidence 609(b).

Defendant Betty Payne next suggests three other issues: (1) the district court committed reversible error in denying a motion for mistrial based upon the government's introduction of testimony from a witness not on the government's witness list; (2) the district court committed reversible error in denying a motion for mistrial after the jury witnessed Defendant Talbert escorted into the courtroom through a side security door by United States Marshals; and (3) the district court committed reversible error in denying a motion for mistrial after the government

entered an exhibit the defense claims was prejudicial and irrelevant during the cross-examination of witness Barbara McMannus.

Defendant Whitfield makes four additional challenges: (1) the government did not present sufficient evidence to support a verdict against him; (2) the district court abused its discretion in admitting a transcript of his grand jury testimony into evidence with certain exculpatory statements redacted; (3) the district court erroneously increased his offense level under the Sentencing Guidelines for occupying a managerial or supervisory role in the offense; and (4) the district court abused its discretion in ordering restitution and then in determining the amount imposed.

Finally, Defendant Talbert raises ten issues: (1) the district court lacked jurisdiction; (2) venue in the district court was improper; (3) the government did not present sufficient evidence to support a verdict against him; (4) the district court denied him his rights under the United States Constitution; (5) the district court erroneously allowed foreign agents from the Internal Revenue Service to be seated with the government attorneys; (6) the district court erred in not recognizing the State's jurisdiction over the subject of religion and not recognizing Defendant Talbert's rights under the United States Constitution, including the First Amendment; (7) the district court erred in not providing Defendant Talbert with his Constitutional *Miranda* rights; (8) he was not represented by competent counsel at trial; (9) the district court judge did not act in accordance with his oath to support the United States Constitution; and (10) the government did not act in accordance with the United States Constitution during the prosecution of his case.

In addition to the above arguments, we are aware that some of the defendants have adopted issues raised by other co-defendants; accordingly, we do not mean to limit each defendant to the specific issues set forth above. Nevertheless, after carefully reviewing the trial record and the briefs submitted by the parties, and after considering oral argument, we find no merit to any of the defendants' contentions. We therefore affirm the convictions and sentences with regard to all defendants.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA — CASE NUMBER: 8:99-CR-78-T-27MSS

vs.

DAVID WHITFIELD: Defendants Attorney: Daniel Daly (standby counsel)

___ pleaded guilty to count(s).
___ pleaded nolo contendere to count(s) which was accepted by the court.
X was found guilty on count(s) 1 through 4, and 6 through 17 after plea of not guilty.

Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

TITLE & SECTION	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNT NUMBER(S)
18 § 371	Conspiracy to commit Mail Fraud, Wire Fraud, and To Transport Property Taken by Fraud Across State Lines	1/99	One
18 § 1956(h)	Conspiracy to Commit Money Laundering	1/99	Two
18 § 1341	Mail Fraud	3/16/96	Three
18 § 1341	Mail Fraud	10/15/96	Four
18 § 1341	Mail Fraud	11/13/96	Six
18 § 1341	Mail Fraud	5/14/98	Seven

18 § 1956 (a)(1)(A)(i)	Money Laundering	4/26/95	Eight
18 § 1956 (a)(1)(A)(i)	Money Laundering	5/18/95	Nine
18 § 1956 (a)(1)(A)(i)	Money Laundering	5/23/95	Ten
18 § 1956 (a)(1)(A)(i)	Money Laundering	6/7/95	Eleven
18 § 1956 (a)(1)(A)(i)	Money Laundering	6/20/95	Twelve
18 § 1957	Unlawful Monetary Transactions Derived from Mail Fraud	1/25/95	Thirteen
18 § 1957	Unlawful Monetary Transactions Derived from Mail Fraud	5/3/95	Fourteen
18 § 1957	Unlawful Monetary Transactions Derived from Mail Fraud	5/31/95	Fifteen
18 § 1957	Unlawful Monetary Transactions Derived from Mail Fraud	6/27/95	Sixteen
18 § 1957	Unlawful Monetary Transactions Derived from Mail Fraud	7/12/95	Seventeen

The defendant is sentenced as provided in pages 3 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and the Mandatory Victims Restitution Act of 1996.

___ The Defendant has been found guilty on count(s)
___ Count(s) *(is)(are) dismissed on the motion of the United States

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.:	358-38-3363
Defendant's Date of Birth:	04/30/52
	Date of Imposition of Sentence: 8/09/01
Defendant's USM No:	38297-018
Defendant's Mailing Address:	c/o U.S. Marshall
Defendant's Residence Address:	c/o U.S. Marshall

JAMES D. WHITTEMORE
U.S. DISTRICT JUDGE
DATE: November 5, 2001

Defendant: DAVID WHITFIELD
Case No: 8:99-CR-78-T-27MSS

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of TWO HUNDRED THIRTY-FIVE (235) MONTHS. Said term to consist of SIXTY (60) MONTHS as to Counts 1, 3, 4, 6, and 7, all terms to run CONCURRENTLY to each other; TWO HUNDRED THIRTY-FIVE (235) MONTHS as to Counts 2, 8, 9, 10, 11, and 12, all terms to run CONCURRENTLY to each other and CONCURRENT to Counts 1, 3, 4, 6, and 7; SIXTY (60) MONTHS as to Counts 13, 14, 15, 16, and 17, all terms to run CONCURRENTLY with each other and CONCURRENT with Counts 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, and 12.

__X__ The Court makes the following recommendations to the Bureau of Prisons: The court recommends confinement at Coleman.

__X__ The defendant is remanded to the custody of the United States Marshal.
_____ The defendant shall surrender to the United States Marshal for this district.

_____ at ___ a.m./p.m. on ___.
_____ as notified by the United States Marshal.

_____ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

_____ before 2 p.m. on ___.
_____ as notified by the United States Marshal.
_____ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on 12/5/2001 to FCC Coleman at Coleman – LOW, with a certified copy of this judgment.

J.M. Killian, Warden
By: Melody Rodgers, LIE

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **THREE (3) YEARS** as to Counts 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17 – **CONCURRENT.**

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.
The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

X The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

_ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquires by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substance, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

____ The defendant shall participate in the Home Detention program for a period of ___. During this time, defendant will remain at defendant's place of residence except for employment and other activities approved in advance by the defendant's Probation Officer. Defendant will be subject to the standard conditions of Home Detention adopted for use in the Middle District of Florida, which may include the requirement to wear an electronic monitoring device and to follow electronic monitoring procedures specified by the Probation Officer. Further, the defendant shall be required to contribute to the costs of services for such monitoring not to exceed an amount determined reasonable by the Probation Officer based on ability to pay (or availability of third party payment) and in conformance with the Probation Office's Sliding Scale for Electronic Monitoring Services.

____ The defendant shall participate, as directed by the Probation Officer, in a program (outpatient and/or impatient) for treatment of narcotic addiction of drug or alcohol dependency. This program may include testing for the detection of substance use or abuse. Further, the defendant shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable by the Probation Officer based on ability to pay or availability of third party payment and in conformance with the Probation Officer's Sliding Scale for Mental Health Treatment Services.

__X__ The defendant shall be prohibited from incurring new credit charges, opening additional lines of credit, acquisitions or obligating himself for any major purchases without approval of the probation officer.

X The defendant shall provide the probation officer access to any requested financial information.

X The defendant shall perform 400 hours of community service during each year of supervision on such terms as directed by the probation officer. This community service may be substituted on an hourly basis for gainful employment where he is paid a wage, other than in the capacity of minister, pastor, or other religious leader.

___ The defendant shall refrain from engaging in any employment related to financial investing involving charitable or religious causes without the express permission of the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Total Restitution
Totals:	$1600.00	$Waived	$85,030,412.00

_____ The determination of restitution is will be determined ___. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

X The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order of percentage payment column below. However, pursuant to 18

U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	Amount of Restitution Ordered
Victims Identified in Court Exhibit #1	$85,030,412*

*To be made jointly and severally with co-defendants Gerald Payne, Betty Payne, Patrick Talbert, and Haywood Eudon Hall.

To the extent that any victim receives compensation as a result of the bankruptcy proceedings, each victim's loss amount shall, for purposes of this Order of restitution, be reduced by the amount so recovered, pursuant to 18 U.S.C. § 3664(f)(2)(A).

(See Court's Order dated November 5, 2001, attached)

____ If applicable, restitution amount ordered pursuant to plea agreement $_____.

____ The defendant shall pay interest on any fine or restitution of more than $2,500, unless fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

____ The court determined that the defendant does not have the ability to pay interest, and is ordered that;

_____ The interest requirement is waived for the ___ fine and/or ___ restitution.

_____ the interest requirement for the ___ fine and/or restitution is modified as follows:

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A. ____ Lump sum payment of $___ due immediately, balance due
___ not later than _____, or
___ in accordance with ___ C, ___ D, or ___ E below; or

B. ____ Payment to begin immediately (may be combined with ___ C, ___ D, ___ E below); or

C. ____ Payment _____ (e.g., equal weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g. months or years), to commence _____ days (e.g. 30 or 60 days) after date of this judgment; or

D. ____ Payment in _____ (e.g. equal, weekly, monthly, quarterly) installments of $_____ over a period of ___, (e.g., months or years) to commence ___ after release from imprisonment to a term of supervision; or

E. _X_ Special instructions regarding the payment of criminal monetary penalties: the Defendant shall immediately begin making nominal payments pursuant to 18 U.S.C. § 3664(f)(3)(B) and shall participate in the Bureau of Prisons' Inmate Financial Responsibility Program.

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a

period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States Attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

____ Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:

____ The defendant shall pay the cost of prosecution.

____ The defendant shall pay the following court cost(s):

____ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-14746

D.C. Docket No. 99-00078-CR-T-25F

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HAYWOOD EUDON HALL,
a.k.a. Don Hall,

Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Florida

(November 10, 2003)

Before BLACK and FAY, Circuit Judges, and HUCK*, District Judge.

FAY, Circuit Judge:

In March 1999, Defendant, Haywood Eudon Hall ("Hall"), was charged in 17 counts of a 20 count indictment

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* Honorable Paul C. Huck, United States District Judge for the Southern District of Florida, sitting by designation.

along with six co-defendants.[1] The government alleged that Hall and the co-defendants, as principals in Greater Ministries International Church (GMIC), managed and promoted a fraudulent investment scheme. Hall was subsequently convicted of five counts: mail fraud conspiracy, money laundering conspiracy, and three counts of mail fraud. In this appeal he raises various challenges to both his convictions and sentencing. Hall first argues that the district court erred in not requiring the jury to find proof of an overt act to support his conviction for conspiracy to commit money laundering under 18 U.S.C. § 1956(h). Since we find that proof of an overt act is not an essential element under § 1956(h), we affirm Hall's money laundering conspiracy conviction. Hall also claims that the district court erroneously applied a two-level increase to his sentence pursuant to U.S.S.G. § 3B1.3 for abuse of position of trust due to his status as a pastor. We conclude that Hall did not occupy a position of trust under the Sentencing Guidelines, and therefore reverse this sentence enhancement.[2]

---

[1] Two co-defendants, James R. Chambers and Andrew J. Krishak, accepted plea agreements for their role in the crime. The other four co-defendants, Gerald Payne, Betty Payne, David Whitfield, and Patrick Talbert, were found guilty on all counts charged against them (except that Count Five was dismissed with respect to all defendants on a motion for judgment of acquittal). These four defendants appeal their convictions and sentences on various grounds, and some have also adopted issues raised by co-defendants; however, we find no merit to any of the issues not discussed in this opinion and they do not warrant discussion.

[2] We are aware that Hall argues the government failed to present sufficient evidence to support any of his convictions and that he has also adopted issues raised by co-defendants; however, we find no merit in any of these issues and they do not warrant discussion.

I.

In early 1996, Hall joined GMIC as a director and pastor of the church, and also became head of its World Missions program. When Hall came to GMIC, he became involved in the "gifting" program that had been started by one of the co-defendants, Gerald Payne. Though the name of the program changed from the "Double Your Money Program," to the "Double Your Blessings Program," and finally to the "Faith Promises Program," the gifting program remained essentially the same throughout its life. Under the program, investors would "gift" money to GMIC in increments of $250 and within 17 months the "giftors" were to get back double their money in the form of "gift-backs."

Hall and some of the other defendants held "road-show" meetings across the country to promote the program. Despite using religious rhetoric to encourage participation in the program, the main focus of the meetings was on how much money could be made. Although there were disclaimers on the "gifting forms" stating that there were no guarantees of a return, the defendants expressly or impliedly promised giftbacks. The defendants told the giftors that profits were generated through investments in mining for precious metals and gems, in offshore commodities and drilling, and in overseas banks that paid high interest rates. Aside from being led to believe that they would get back double their money, potential investors were also told that some of the profits generated would go to feed the homeless, rehabilitate drug addicts, and support missionaries.

However, GMIC never had any of the assets the defendants claimed to be investing in. There is no record of

GMIC or any one of the defendants having gold, silver, or diamond mines in the United States from 1978 to the present. In addition, the diamond and gold mines GMIC was supposed to be operating in Liberia never did fully get off the ground. Although a diamond mine there produced tiny industrial grade diamonds of little value, the gold mines were never even operational. GMIC, however, did buy gold and silver and then had a company mint gold and silver medallions with the GMIC logo on them in order to promote the gifting program to potential giftors and to appease already dissatisfied investors.

Furthermore, the GMIC office supposedly located in the Cayman Islands never existed. Similarly, the Greater International Bank of Nauru was merely a storefront inside GMIC's Tampa building. No money was ever deposited into the Bank of Nauru, as giftbacks were deposited purely on paper by the giftors through couriers. Giftors were encouraged to make their gifts through these courier services, and this made it especially easy for already participating investors to "re-gift" their giftbacks, or deposit them in this "offshore bank," without ever seeing the cash, thus allowing the defendants to perpetrate their fraud. If a giftor, however, still wanted to withdraw money from his account, the bank representative, a GMIC gospel singer, would have to go directly to Defendant Payne to get money or gold.

Notwithstanding the defendants' promises of large amounts of money, many investors received little or no return on their gifts. When giftors inquired about their money, the defendants employed stalling techniques. Moreover, despite the defendants' claims that giftors' investments were going to charity, only about one percent of this money went to charitable purposes. In contrast,

each director received monthly "gas money," which was five percent commission of all money gifted or re-gifted by an investor recruited by that director. All gas money was paid in cash by Defendant Payne, and over the course of the fraud, Hall received more than $539,000 of this money.

II.

Hall first claims that the district court erred in refusing to instruct the jury that proof of an overt act was necessary to convict him under 18 U.S.C. § 1956(h) for conspiracy to commit money laundering. Although this Court reviews a refusal to give a requested jury instruction for abuse of discretion, *United States v. Condon*, 132 F.3d 653 (11th Cir. 1998), if the refusal was based on an error of law, then it is by definition an abuse of discretion. *United States v. Govan*, 293 F.3d 1248, 1250 (11th Cir 2002). While neither this Court nor the Supreme Court has determined whether commission of an overt act is an essential element of a conviction under § 1956(h), other circuits are split on the issue. *See United States v. Godwin*, 272 F.3d 659, 669 n.9 (4th Cir. 2001) (noting that 18 U.S.C. § 1956(h) does not explicitly require proof of an overt act); *United States v. Tam*, 240 F.3d 797, 802 (9th Cir. 2001) (finding that § 1956(h) does not require the indictment to allege an overt act). *But see United States v. Wilson*, 249 F.3d 366, 379 (5th Cir. 2001) (finding proof of an overt act is required for a conviction under § 1956(h)); *United States v. Hildebrand*, 152 F.3d 756, 762 (8th Cir. 1998) (finding that § 1956(h) requires proof of an overt act for conviction).

Those circuit courts that have found § 1956(h) to require proof of an overt act have relied on case law interpreting the general conspiracy statute of 18 U.S.C.

§ 371. *See Wilson*, 249 F.3d at 379; *Hildebrand*, 152 F.3d at 762. Section 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons **do not act to effect the object of the conspiracy**, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 371 (emphasis added). It is important to note that § 371 expressly requires proof of an overt act in furtherance of the conspiracy to establish violation of the statute. However, the money laundering conspiracy statute, 18 U S.C. § 1956(h), does not contain this express language:

> Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

18 U.S.C. § 1956(h). In this respect, the language of § 1956(h) is not like § 371, but instead is nearly identical to the drug conspiracy statute, 21 U.S.C. § 846. *See Tam*, 240 F.3d at 802; *United States v. Threadgill*, 172 F.3d 357, 366 n.5 (5th Cir. 1999). Section 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 846. The Supreme Court, recognizing that the language of § 846 does not call for an overt act, refused to infer an overt act requirement into the statute. *United States v. Shabani*, 513 U.S. 10, 13 (1994). In reaching this conclusion, the Supreme Court compared the language of 21 U.S.C. § 846 to that of 18 U.S.C. § 371:

> [W]e find it instructive that the general conspiracy statute, 18 U.S.C. § 371, contains an explicit requirement that a conspirator "do any act to effect the object of the conspiracy." In light of this additional element in the general conspiracy statute, Congress' silence in § 846 speaks volumes.

Id. at 14. Since the language of the statute at issue here, 18 U.S.C. 1956(h), is nearly identical to 21 U.S.C. § 846, we are compelled to follow the Supreme Court's reasoning in *Shabani*. Given the absence of any language in § 1956(h) requiring proof of an overt act, we find that an overt act is not an essential element for conviction of conspiracy to commit money laundering. Accordingly, the jury instructions approved by the district court were indeed proper.

III.

Hall next contends that the district court erroneously enhanced his sentence under U.S.S.G. § 3B1.3 for abuse of position of trust due to his status as a pastor. Pursuant to the Sentencing Guidelines, this two-level increase is appropriate "[i]f the defendant abused a position of public or private trust, ... in a manner that significantly facilitated the commission or concealment of the offense." U.S.S.G. § 3B1.3. In order for the district court to have applied this increase, two elements must have been

established: (1) that the defendant occupied a position of public or private trust; and (2) that the defendant abused that position in a significant way to facilitate the commission or concealment of the offense. *United States v. Garrison*, 133 F.3d 831, 837 (11th Cir. 1998). "We review the district court's fact findings for clear error, but its determination whether the facts justify an abuse-of-trust enhancement we review de novo." *United States v. Ward*, 222 F.3d 909, 911 (11th Cir. 2000) (quotation marks and citation omitted). Although we accept the district court's finding of fact with regard to Hall's status as a pastor, we conclude that this fact alone is insufficient to support a determination that Hall occupied a position of trust with respect to the victims.

In finding that Hall's status as a pastor put him in a position of trust, the district court did not indicate whether it found Hall to have occupied a position of public trust or of private trust. Nevertheless, it is of no consequence as to whether we analyze this as a private or public trust, for we find the evidence in the record to be insufficient to support a finding that the relationships, if any, between Hall and the victims were of the type to put Hall in any position of trust under the Sentencing Guidelines. Within the context of fraud, this Court has found a position of trust to exist in two instances: "(1) where the defendant steals from his employer, using his position in the company to facilitate the offense, and (2) where a fiduciary or personal trust relationship exists with other entities, and the defendant takes advantage of the relationship to perpetrate or conceal the offense." *Garrison*, 133 F.3d at 837-38 (quotations omitted). This case can only fall within the second situation. However, since the government does not allege the existence of a fiduciary

relationship, to conclude that Hall occupied a position of trust we must find a "personal trust relationship" between Hall and the victims.

Hall's status as a pastor does not necessarily create a personal trust relationship between himself and the victims.[3] *See United States v. Morris*, 286 F.3d 1291, 1297 (11th Cir. 2002). *See also United States v. Caplinger*, 339 F.3d 226, 236-38 (4th Cir. 2003) (finding that defendant's representation as a physician did not by itself mean he occupied a position of trust). In *Morris*, though the defendant was represented as an attorney to investors in an investment fraud scheme, he was found not to have abused a position of trust. *See id.* at 1296-97. This Court explained:

> [I]t simply is not the case that an attorney holds a position of trust with respect to all people with whom he comes into contact solely by virtue of his status as an attorney. Morris did not have an attorney-client relationship with any of the victims. Although Morris' status as an attorney may have been used to develop the trust of the victims, there are no facts to support the conclusion

[3] The district court cites the Seventh Circuit case, *United States v. Lilly*, 37 F.3d 1222 (7th Cir. 1994), as being instructive in determining that Hall occupied a position of trust by virtue of his status as a pastor. Although *Lilly* dealt with an investment fraud scheme by a pastor, the *Lilly* court specifically found that "regardless of the position Pastor Lilly held with respect to the non-Church member investors, the Pastor undoubtedly held a position of trust within the Church." *Id.* at 1227. However, since all the victims presented by the government in this case were non-church member investors, the district court's reliance on *Lilly* is misplaced.

> that as an attorney Morris occupied a position of trust in relation to these victims.

Id. at 1297. As in *Morris*, the government concedes that there is no evidence in the record indicating that Hall had a pastor-clergy relationship with any of the victims. Although Hall may have used his status as a pastor to develop the trust of investors, this does not demonstrate that Hall created a personal trust relationship with any of the victims. The government claims that evidence of Hall espousing religious rhetoric at the roadshow meetings is sufficient to establish this relationship. However, we must be careful to "distinguish between those arms-length commercial relationships where trust is created by the defendant's personality or the victim's credulity, and relationships in which the victim's trust is based on defendant's position in the transaction." *Garrison*, 133 F.3d at 838 (citations omitted). Since Hall and the other elders traveled across the country, these meetings were not regularly held in one locality, and listening to a meeting over the course of a few hours is not enough to establish the type of relationship contemplated by the Sentencing Guidelines. The government attempts to equate Hall's speeches at these meetings with the type of preaching a pastor engages in with members of his church at regular church services. These roadshow meetings, however, were not regular church services, and the government concedes that there is no evidence in the record to indicate Hall preached about the gifting program to victims at regular church services where he presided as a pastor.

Most importantly, in determining whether Hall occupied a position of trust, we must focus on the relationship between Hall and the victims from the perspective of

the victims. *Garrison*, 133 F.3d at 837. Thus, Hall's status as a pastor and his involvement in the roadshows are only as significant as the victims indicate. It was the government's burden during sentencing, to show, by a preponderance of the evidence, that Hall occupied a position of trust with respect to his victims. *See United States v. Kummer*, 89 F.3d 1536, 1545 (11th Cir. 1996). However, instead of presenting any evidence to indicate that there was in fact a personal trust relationship between Hall and even one victim, the government relied solely on Hall's status as a pastor. During trial, the government called multiple victims as witnesses. None of these victims came to the roadshows for spiritual guidance; rather, all of them testified that they came to invest money, not because Hall was a pastor, but because they wanted to "double their money." The government did not even present evidence that Hall spoke of the gifting program to church members during regular church services, much less evidence that even one church member was a victim of his fraud. Now the government asks this Court to assume that at least one of the victims was a member of Hall's church and considered Hall to be his pastor. We decline to assume facts that the government had ample opportunity to establish during either trial or sentencing. When these victims decided to invest their money, they trusted that this was a legitimate investment program as represented by the directors, including Hall; however, this relationship between Hall and his victims is no different than the relationship that exists in every successful fraud. *See id.* at 838. With respect to the victims that the government presented, there was no personal trust relationship with Hall so as to place him in a position of trust under the Sentencing Guidelines, and therefore the two-level enhancement under U.S.S.G. § 3B1.3 was in error. We are

therefore obliged to vacate the sentence imposed and remand for resentencing.

AFFIRMED in part; REVERSED in part; Sentence Vacated and remanded for resentencing.

Supreme Court, U.S.
FILED
MAY 12 2004
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Nos. 03-1293 and 03-1294

In the Supreme Court of the United States

DAVID WHITFIELD, PETITIONER

v.

UNITED STATES OF AMERICA

HAYWOOD EUDON HALL, AKA DON HALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a conviction for conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h), requires proof of an overt act in furtherance of the conspiracy.

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In the Supreme Court of the United States

No. 03-1293

DAVID WHITFIELD, PETITIONER

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v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a)[1] is reported at 349 F.3d 1320.

[1] "Pet App." refers to the appendix to the petition in No. 03-1294.

JURISDICTION

The judgments of the court of appeals were entered on November 10, 2003. On January 14, 2004, Justice Kennedy extended petitioner Whitfield's time within which to file a petition for a writ of certiorari to and including March 8, 2004, and the petition was filed on March 5, 2004. On February 5, 2004, Justice Kennedy extended petitioner Hall's time within which to file a petition for a writ of certiorari to and including March 10, 2004, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioners Whitfield and Hall were convicted of conspiracy to commit mail fraud, wire fraud, and interstate transportation of property taken by fraud, in violation of 18 U.S.C. 371, and conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h). Petitioner Whitfield was also convicted of four counts of mail fraud, in violation of 18 U.S.C. 1341; five counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i); and five counts of unlawful monetary transactions, in violation of 18 U.S.C. 1957. Petitioner Hall was also convicted of three counts of mail fraud, in violation of 18 U.S.C. 1341. Petitioner Whitfield was sentenced to 235 months of imprisonment, and petitioner Hall was sentenced to 185 months of imprisonment, each to be followed by three years of supervised release. The court of appeals affirmed. Whitfield Pet. App. 6-18; Pet. App. 1a-11a, 12a-17a.

1. Petitioners were members of the executive board of the Greater Ministries International Church (GMIC).

Petitioner Hall was the president, pastor and an elder of GMIC; petitioner Whitfield was the treasurer, financial officer, and also an elder. Petitioners and their co-conspirators ran GMIC's "gifting" program. Under that program, investors would "gift" money to GMIC; in exchange, the investors were promised a return that doubled their contribution. Petitioners touted the program in presentations throughout the country, explaining that profits were generated through investments in gold and diamond mining, offshore commodities, and overseas banks that paid high interest rates, and that some profits were also to be used for philanthropic purposes. Pet. App. 3a; Gov't C.A. Br. 6-9.

Most of those claims were false. GMIC had no assets, and many investors received little or no return on their gifts. Moreover, only one percent of the money was donated to charity. Instead, petitioners and their co-conspirators received commissions on money that they solicited. Petitioner Hall received more than $539,000, and petitioner Whitfield received more than $678,000. Pet. App. 4a-5a; Gov't C.A. Br. 13-14.

As relevant here, petitioners were charged in count one of the indictment with conspiracy to commit mail fraud, wire fraud, and interstate transportation of goods and money taken by fraud, in violation of 18 U.S.C. 371. That count described the scheme in the "manner and means" section, including petitioners' withdrawals of large amounts of investors' funds to make payments to earlier investors and to pay commissions to the GMIC directors and other conspirators. Count one also listed 20 overt acts. Count two of the indictment charged petitioners with conspiracy to launder money, in violation of 18 U.S.C. 1956(h), and incorporated the "manner and means" section of count one. Indictment 1-11.

Petitioners requested that the district court instruct the jury that it had to find an overt act in furtherance of the money laundering conspiracy. The district court denied that request. The jury convicted petitioners of both conspiracy counts. Gov't C.A. Br. 5, 43.

2. The court of appeals affirmed. Pet. App. 1a-11a. Relying on this Court's decision in *United States* v. *Shabani*, 513 U.S. 10 (1994), it held that Section 1956(h) does not include an overt-act requirement and that the district court's instructions were therefore correct. Pet. App. 5a-7a.

ARGUMENT

Petitioners contend (Hall Pet. 12-16; Whitfield Pet. 4-10) that, in order to prove a money laundering conspiracy in violation of 18 U.S.C. 1956(h), the government must prove an overt act. That argument lacks merit and does not warrant further review by this Court.

1. In *United States* v. *Shabani*, 513 U.S. 10 (1994), this Court held that the drug conspiracy statute, 21 U.S.C. 846, does not require proof of an overt act. Section 846 provides that "[a]ny person who * * * conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the [substantive] offense." 21 U.S.C. 846 (quoted in *Shabani*, 513 U.S. at 13). In holding that the offense defined by Section 846 does not require proof of an overt act, the Court placed substantial reliance on its prior decisions in *Nash* v. *United States*, 229 U.S. 373 (1913), and *Singer* v. *United States*, 323 U.S. 338 (1945). Those cases held that no overt act is required for the conspiracy offenses under the Sherman Act, 15 U.S.C. 1 *et seq.*, and the Military Selective Service Act, 50 U.S.C.

451 *et seq.* See 513 U.S. at 13. The *Shabani* Court explained:

> *Nash* and *Singer* follow the settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms. * * * We have consistently held that the common law understanding of conspiracy "does not make the doing of any act other than the act of conspiring a condition of liability."

Id. at 13-14 (quoting *Nash*, 229 U.S. at 378).

The Court also observed in *Shabani* that the general conspiracy statute, 18 U.S.C. 371, "contains an explicit requirement that a conspirator 'do any act to effect the object of the conspiracy.'" 513 U.S. at 14 (quoting 18 U.S.C. 371). "In light of this additional [overt-act] element in the general conspiracy statute," the Court stated, "Congress' silence in § 846 speaks volumes." *Ibid.*

That analysis applies equally here. The text of Section 1956(h), like that of Section 846, contains no overt-act requirement. Under the rule of construction set forth in *Shabani*, the absence of an express overt-act requirement demonstrates that Section 1956(h) incorporates the common law rule that proof of an overt act is not required. Like the court below, the Fourth and Ninth Circuits have correctly reached that conclusion. See, *e.g.*, *United States* v. *Bolden*, 325 F.3d 471, 491 (4th Cir. 2003); *United States* v. *Tam*, 240 F.3d 797, 802 (9th Cir. 2001).

2. As petitioners explain (Hall Pet. 5-9; Whitfield Pet. 6-9), opinions of the Third, Sixth, Seventh, Eighth, and Tenth Circuits state that proof of an overt act is an element of the money laundering conspiracy offense.

See *United States* v. *Evans*, 272 F.3d 1069, 1082 (8th Cir. 2001), cert. denied, 535 U.S. 1029 (2002); *United States* v. *Ross*, 190 F.3d 446, 450 (6th Cir.), cert. denied, 528 U.S. 1033 (1999); *United States* v. *Navarro*, 145 F.3d 580, 593 (3d Cir. 1998); *United States* v. *Emerson*, 128 F.3d 557, 561 (7th Cir. 1997); *United States* v. *Hand*, No. 95-8007, 1995 WL 743841 (10th Cir. Dec. 15, 1995) (76 F.3d 393 (Table)), cert. denied, 517 U.S. 1162 (1996).[2] For two reasons, however, those cases do not create a need for review in this case.

First, in the cases on which petitioners rely, the question whether proof of an overt act is required to establish a violation of Section 1956(h) was not at issue, and in all of those cases, the defendants' conspiracy convictions were affirmed. See *Evans*, 272 F.3d at 1098; *Ross*, 190 F.3d at 455; *Navarro*, 145 F.3d at 593; *Emerson*, 128 F.3d at 568; *Hand*, 1995 WL 743841, at *5. The statements in those opinions that proof of an overt act is a required element of a Section 1956(h) violation therefore amounted to dicta. Petitioners cite

[2] Petitioners assert (Hall Pet. 5-6; Whitfield Pet. 8) that the Fifth Circuit requires proof of an overt act. But *United States* v. *Threadgill*, 172 F.3d 357, 366 & n.5 (5th Cir.), cert. denied, 528 U.S. 871 (1999), is the only Fifth Circuit case to address the application of *Shabani* to Section 1956(h). The Fifth Circuit stated there that the question whether the money laundering conspiracy offense requires proof of an overt act is an open one. It did not reach the issue because the applicable count alleged several overt acts. Although the case that petitioners rely on, *United States* v. *Wilson*, 249 F.3d 366, 379 (5th Cir. 2001), states that an overt act is required, other cases subsequent to *Threadgill* and *Wilson* do not. See *United States* v. *Rivera*, 295 F.3d 461, 467-468 (5th Cir. 2002); *United States* v. *Virgen-Moreno*, 265 F.3d 276, 284 (5th Cir. 2001), cert. denied, 534 U.S. 1095 (2002). The Second Circuit has also noted the potential application of *Shabani* to Section 1956(h). *United States* v. *LaSpina*, 299 F.3d 165, 173 n.2 (2d Cir. 2002).

no case in which a money laundering conspiracy conviction under Section 1956(h) has been reversed for lack of proof of an overt act in furtherance of the conspiracy.

Second, while the decisions on which petitioners rely post-date *Shabani*, they do not address the effect of *Shabani* on the question whether Section 1956(h) requires proof of an overt act; indeed, they do not mention *Shabani* at all. Instead, they rely on inapplicable money laundering conspiracy cases charged pursuant to 18 U.S.C. 371 or drug conspiracy cases charged pursuant to 21 U.S.C. 846 that do not survive *Shabani*. See *Evans*, 272 F.3d at 1082 (relying on *United States* v. *Hildebrand*, 152 F.3d 756, 762 (8th Cir.), cert. denied, 525 U.S. 1033 (1998), which, in turn, relied on *United States* v. *Conley*, 37 F.3d 970, 976-977 (3d Cir. 1994), which charged a conspiracy under Section 371); *Navarro*, 145 F.3d at 593 (also relying on *Conley*); *Emerson*, 128 F.3d at 561-562 (relying on *United States* v. *Rodriguez*, 53 F.3d 1439, 1444 (7th Cir. 1995), which charged a conspiracy under Section 371); *Ross*, 190 F.3d at 450 (relying on *United States* v. *Lee*, 991 F.2d 343, 348 (6th Cir. 1993), which charged a conspiracy pursuant to 21 U.S.C. 846); *Hand*, 1995 WL 743841, at *2 (relying on *United States* v. *Hanson*, 41 F.3d 580, 582 (10th Cir. 1994), which charged a conspiracy under Section 371). Because *Shabani* makes clear that no overt act is required to establish a violation of Section 1956(h), there is every reason to believe that all the courts will reach that conclusion once the issue is squarely before them, *Shabani* is brought to their attention, and they therefore address the application of this Court's reasoning in *Shabani*.

3. Petitioner Hall seeks to distinguish *Shabani* on several grounds, but none is persuasive. Hall contends (Pet. 13-14) that the legislative history supports his

argument that Section 1956(h) requires an overt act. But when the statutory language is clear, as it is here, this Court will not resort to legislative history. *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."). In any event, the legislative history does not support petitioners' position. That history makes clear that Congress modeled Section 1956(h) on the drug conspiracy statute at issue in *Shabani*. 137 Cong. Rec. 31,536-31,537 (1991); 137 Cong. Rec. 21,942-21,943 (1991); 137 Cong. Rec. 17,432-17,435 (1991); H. R. Rep. No. 28, 102d Cong., 1st Sess. Pt. 2, at 49 (1991). As the Court explained in *Shabani*, "*Nash* and *Singer* give Congress a formulary: by choosing a text modeled on § 371, it gets an overt-act requirement; by choosing a text modeled on the Sherman Act, 15 U.S.C. § 1, it dispenses with such a requirement." 513 U.S. at 14 (quoting *United States* v. *Sassi*, 966 F.2d 283, 284 (7th Cir.), cert. denied, 506 U.S. 991 (1992)). For the same reason, Congress's use of Section 846 as a model demonstrates that it intended that Section 1956(h) contain no overt-act requirement.

Petitioner Hall further argues (Pet. 14-15) that because the venue provision in the money laundering statute, 18 U.S.C. 1956(i) (Supp. I 2001), refers to overt acts, Congress assumed the existence of an overt-act requirement in Section 1956(h). That argument is unpersuasive. Section 1956(i) was added by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, § 1004, 115 Stat. 392. Responding to the Court's decision in *United States* v. *Cabrales*, 524 U.S. 1 (1998), Section 1956(i) clarified that a substantive money laundering prosecution may be brought in the district

where the underlying specified unlawful activity took place if the defendant participated in the movement of the criminal proceeds from that district to the district where the financial or monetary transaction occurred. The amendment also codified the existing case law that venue for attempts and conspiracies is not limited to the district where the completed offense would have occurred, but will lie in any district where an overt act was committed. That component of the Act does not presuppose that an overt act is required to establish a violation; instead, it makes prosecution possible in a venue where an overt act occurs regardless of whether proof of an overt act is required. Thus, in drug conspiracy prosecutions, venue will lie in any district where an overt act has ocurred even though the drug conspiracy statute does not require proof of an overt act. See, *e.g.*, *United States* v. *Rodriguez*, 67 F.3d 1312, 1318 (7th Cir. 1995) ("Venue under 21 U.S.C. § 846 lies in any district in which an overt act in furtherance of the conspiracy occurred."), cert. denied, 517 U.S. 1174 (1996); *United States* v. *Rinke*, 778 F.2d 581, 584-585 (10th Cir. 1985) ("when the offense charged is conspiracy [in violation of 21 U.S.C. 846], * * * venue as to prosecution of all members of [the] conspiracy lies either in the jurisdiction in which the conspiratorial agreement was formed or in any jurisdiction in which an overt act in furtherance of the conspiracy was committed by any of the conspirators") (internal quotation marks and citation omitted).

Finally, contrary to petitioner Hall's contention (Pet. 16), the rule of lenity does not apply here. "The rule of lenity * * * applies only when, after consulting traditional canons of statutory construction, [the Court is] left with an ambiguous statute." *Shabani*, 513 U.S. at 17. Here, for precisely the same reasons as in

Shabani, the statute is not ambiguous. The rule of lenity therefore does not apply.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2004

(3)

No. 03-1293

Supreme Court, U.S.
FILED
JUN 1 - 2004
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In The

Supreme Court of the United States

DAVID WHITFIELD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

DAVID WHITFIELD
P.O. Box 1031
Coleman, FL 33521-1031

Petitioner

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REPLY BRIEF FOR PETITIONER

The Respondent, UNITED STATES OF AMERICA, contends that there are essentially two reasons why this Court should not take the time to settle the dispute between the federal circuit courts on the question presented: Whether a conviction for conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h), requires proof of an overt act in furtherance of the conspiracy? The government's brief in opposition (Opp.) first paints a picture that this Court's decision in *United States v. Shabani*, 513 U.S. 10 (1994), clearly settled the issue. The second stroke of the very same brush gives the illusion that there really isn't a split among the federal circuits on the question presented in the case *sub judice*. Opp. 4-7. Given the Eleventh Circuit's decision in this case, wherein it clearly recognized and duly noted the division amongst the circuit courts on the question presented here, Mr. Whitfield respectfully submits the government's suggestions are simply disingenuous. So too is the government's claim that through time the federal circuits who have decided, post-*Shabani*, that an overt act is required to sustain a conviction for conspiracy to commit money laundering, will come to realize that they were wrong in their decisions. For the reasons stated below and in his petition, Mr. Whitfield respectfully submits this Court should and must resolve this most important federal question since the outcome not only affects how the government prosecutes a case, but more importantly, the manner and method by which to apply the law to individuals throughout this country as intended by Congress.

1. At the outset, the Eleventh Circuit has noted the circuit split on the question whether an overt act is an essential element for conviction of conspiracy to commit

money laundering, *United States v. Hall*, 349 F.3d 1320, 1323 (11th Cir. 2003). Although the appellate court sided with the minority of the circuits, contrary to the government's claim, there is a definitive split on the legal interpretation and application of the money laundering conspiracy statute, Title 18 U.S.C. § 1956(h) – now that is a given. Unlike the government, the Eleventh Circuit did not distinguish the circuits' decision as a reliance on *dicta* for a very good reason, the decisions generated by the appellate courts were something more than *judicial dictum* or *obiter dictum*.

In evaluating dicta, "[m]uch depends on the character of the dictum. Mere obiter may be entitled to little weight, while a carefully considered statement . . . , though technically dictum, must carry great weight, and may even . . . be regarded as conclusive." Charles A. Wright, *The Law of Federal Courts* § 57, at 374 (4th ed. 1983). Here, the decisions of the appellate courts, which have expressly held or otherwise affirmatively stated that an overt act is an essential element for a conviction for conspiracy to commit money laundering carefully, considered the issue. In Mr. Whitfield's judgment, and apparently the judgment of the federal appellate courts who adhered to the decisions by the Third Circuit in *United States v. Conley*, 37 F.3d 970 (3rd Cir. 1994), the Fifth Circuit in *United States v. Wilson*, 249 F.3d 366 (5th Cir. 2001), the Eighth Circuit in *United States v. Hildebrand*, 152 F.3d 756 (8th Cir. 1998), and the Tenth Circuit in *United States v. Hand*, 1995 WL 743841, 76 F.3d 393 (10th Cir. 1995), it would be blinking reality to pass off the aforementioned appellate courts' decision regarding the requirement of an overt act as a chance statement. This conclusion draws the grease from the goose.

2. Having shown the circuit split is genuine, this begs the question whether this Court should resolve the

split or simply see if it can resolve itself over time, as the government now suggests. The answer lies in this Court's decision in *Braxton v. United States*, 500 U.S. 344, 11 S.Ct. 1854 (1991) where Justice Scalia delivered the opinion for this Court:

> A principal purpose for which we use our certiorari jurisdiction, and the reason we granted certiorari in the present case, is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law. See this Court's Rule 10.1. With respect to federal law apart from the Constitution, we are not the sole body that could eliminate such conflicts, at least as far as their continuation into the future is concerned. Obviously, Congress itself can eliminate a conflict concerning a statutory provision by making a clarifying amendment to the statute, and agencies can do the same with respect to regulations. Ordinarily, however, we regard the task as initially and primarily ours.

Braxton, 500 U.S. at 347-48. This Court also has consistently held that "[p]rudence also dictates awaiting a case in which the issue was fully litigated below, so that [the Court] will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question." *Yee v. Escondido*, 503 U.S. 519, 538, 112 S.Ct. 1522 (1992) (citing *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552 n. 3, 110 S.Ct. 1331 (1990) ("Applying our analysis . . . to the facts of a particular case without the benefit of a full record or lower court determinations is not a sensible exercise of this Court's discretion").

Where as here, the federal circuit courts are still split over the issue concerning the money laundering conspiracy statute years after this Court's decision in *Shabani*,

heightens the concerns and needs for this Court to intercede and make clear what Congress has failed to do. As the Chief Justice has explained:

> [B]orne out time and again in our decisions to grant or deny certiorari, is that ordinarily a court of appeals decision interpreting one of our precedents – even one deemed to be arguably inconsistent with it – will not be reviewed unless it conflicts with a decision of another court of appeals. This fact is a necessary concomitant of the limited capacity in this Court.

Hubbard v. United States, 514 U.S. 695, 720, 115 S.Ct. 1754 (1995) (Rehnquist, C.J., dissenting). The instant case now before the Court contains every ingredient and otherwise meets the criteria set forth by this Court to grant certiorari. The passing of time has not resolved the split as the record plainly demonstrates, nor has Congress sought fit to make clear what it intended under the money laundering conspiracy statute. Moreover, should this Court deny certiorari in the instant case, the division among the circuit courts will continue since nothing can be inferred from said denial. *See, United States v. Carver*, 260 U.S. 482, 490, 43 S.Ct. 181 (1923) ("The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times").

The public's confidence in the fair administration of justice is at stake here – to explore the relative harm to Mr. Whitfield and the government, as well as the interests of the public at large clearly would be appropriate in this case by the Court, or so Mr. Whitfield opines. To say more here would be supererogatory! The instant case has been fully argued below by the parties and squarely decided on by the Eleventh Circuit on the question presented before

this Court. Simply put, the issue of whether an overt act is an essential element for conviction for conspiracy to commit money laundering is *ripe* for review by this Court. It is axiomatic that this case is not only deserving of this Court's attention given the circuit courts' split, but resolution by this Court, in order to preserve the integrity of the criminal justice system and to maintain equal application of the federal laws in this country.

CONCLUSION

For the foregoing reasons, and for those in the petition, the petition for writ of certiorari should be granted, the judgment of the Eleventh Circuit vacated, and Mr. Whitfield's conviction for conspiracy to commit money laundering reversed. Mr. Whitfield further requests other relief this Court deems proper and just.[1]

Respectfully submitted,

DAVID WHITFIELD
P.O. Box 1031
Coleman, FL 33521-1031

[1] Mr. Whitfield is proceeding here *pro se* and without the assistance of competent counsel. Although he is being assisted by an inmate paralegal specialist, he requests this Court to exercise its discretion in addressing itself to any legal theory that would bear on the issues raised. *See, United States v. Dickerson*, 166 F.3d 667, 669 (4th Cir. 1999).

Mr. Whitfield further requests this Court to liberally construe his petition in order to do substantial justice. *See, Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S.Ct. 594, 596 (1972). Should this Court grant certiorari in this case, Mr. Whitfield will employ counsel to fully brief and argue the merits of the case before the Court.

(5) (5)

No. 03-1293 & 03-1294

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DAVID WHITFIELD,
Petitioner,
v.
UNITED STATES OF AMERICA,

HAYWOOD EUDON HALL, aka DON HALL,
Petitioner,
v.
UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONS FOR CERTIORARI FILED MARCH 5, 2004 AND MARCH 10, 2004
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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 99-78-CR-T-25F

UNITED STATES OF AMERICA

v.

GERALD PAYNE, BETTY PAYNE, PATRICK TALBERT, HAYWOOD EUDON HALL, a/k/a DON HALL, DAVID WHITFIELD, ANDREW J. KRISHAK, and JAMES R. CHAMBERS.

INDICTMENT

The grand jury charges:

COUNT ONE
(CONSPIRACY)

A. Introduction

At times material to this Indictment:

1. Greater Ministries International, Inc. (hereinafter "GMI"), was a Florida corporation formed for the purported purpose of providing a vehicle for the operation of a Christian church. GMI operated out of a building located at 715 East Bird Street, Tampa, Florida.

2. The "Double Your Money Gift Exchange Program" (hereinafter "the fraudulent investment program") was an investment program which GMI, the defendants, and other conspirators operated and promoted. At various times, the fraudulent investment program was also named the "Double Your Blessing Gift Exchange Program", "Greater Trust Gift Exchange", and "Faith Promises Program." At various times,

it purportedly was administered by entities such as Greater Trust; I John 4:4; Greater Ministries International, Inc. of Grand Cayman B.W.I.; and Ultimate Pension Fund (UPF) Trust. Despite the name changes, the terms of the investment program remained essentially the same.

3. Defendant, GERALD PAYNE, was the President and a director of GMI. His wife, defendant, BETTY PAYNE, served as secretary and as a director of GMI.

4. "Gas money" was the term used by the defendants for commissions paid to GMI directors and "elders" for bringing investors into the fraudulent investment program. Directors and "elders" received five percent of the money invested by any person they recruited into the fraudulent investment program.

5. Defendant, HAYWOOD EUDON HALL, a/k/a DON HALL, was a director of GMI.

6. Defendant, PATRICK TALBERT, was a director of GMI and an "overseer" of GMI's "law department."

7. Defendant, DAVID WHITFIELD, was Secretary and Financial Director of GMI. He also owned and operated Heritage Courier Service.

8. Defendant, ANDREW J. KRISHAK, was GMI's Director of Disbursement of Funds. He and his wife also operated Good Shepherd Courier Service. KRISHAK also claimed to be a representative of the Bank of Nauru, purportedly a foreign chartered bank affiliated with GMI.

9. Defendant, JAMES R. CHAMBERS, was a GMI director. As a consequence of his holding this position, he received more than $400,000 in "gas money" from GMI.

B. The Conspiracy

10. Beginning at least as early as March 1993, and continuing through January 1999, in the Middle District of Florida, and elsewhere,

> GERALD PAYNE, BETTY PAYNE, PATRICK TALBERT, HAYWOOD EUDON HALL, a/k/a DON HALL, DAVID WHITFIELD, ANDREW J. KRISHAK, and JAMES R. CHAMBERS,

did knowingly and willfully combine, conspire, confederate, and agree with one another, and with others both known and unknown to the grand jury, to commit the following offenses against the United States:

> (A) to knowingly and willfully devise and attempt to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises and to cause items to be delivered by the United States mails according to the directions thereon for the purpose of executing said scheme and artifice, in violation of Title 18, United States Code, Section 1341;
>
> (B) to knowingly and willfully devise and attempt to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretense, representations, and promises and to transmit and cause to be transmitted in interstate and foreign commerce, writings, signs, signals, and sounds for the purpose of executing said scheme and artifice, in violation of Title 18, United States Code, Section 1343; and
>
> (C) to knowingly transport, transmit, and transfer in interstate and foreign commerce goods, securities, and money having a value in excess of $5,000, knowing the same to have been stolen, converted, and taken

by fraud, in violation of Title 18, United States Code, Section 2314.

C. Manner and Means

The manner and means utilized to accomplish the objects of the conspiracy included, among others, the following:

11. It was a part of the conspiracy that the defendants, and others, would and did solicit victim investors to place money into the fraudulent investment program.

12. It was further a part of the conspiracy that the defendants, and others, would and did represent and promise that fully twice the amount of money placed into the fraudulent investment program would be returned to victim investors in incremental payments within a 17 month period, according to a fixed schedule.

13. It was further a part of the conspiracy that in order to create the illusion that the fraudulent investment program was a solvent, profit generating enterprise earning sufficient returns to repay the victim investors within the specified times, the defendants, and others, would and did make periodic payments to victim investors which were purportedly returns on said victim's investments, but which were, in fact, payments made with funds obtained from later investors.

14. It was further a part of the conspiracy that the defendants, and others, would and did fail to disclose to the victim investors that five percent of their investment would be used to pay a commission to GMI directors or other conspirators.

15. It was further a part of the conspiracy that the defendants, and others, would and did fraudulently represent to the victim investors that their money would be used to conduct offshore trades of precious metals and foreign currency, on which the investment program would realize profits as high as forty percent.

16. It was further a part of the conspiracy that the defendants, and others, would and did make false statements to the victim investors in which the defendant and others fraudulently inflated the amounts of money previously paid into and repaid by the fraudulent investment program.

17. It was further a part of the conspiracy that the defendants and others would and did make false and fraudulent statements to the victim investors concerning the nature and amount of income producing assets owned or controlled by the fraudulent investment program, GMI, and its affiliated entities and the commercial activities by which the fraudulent investment program generated profits.

18. It was further a part of the conspiracy that the defendants, and others, would and did falsely and fraudulently represent to the victim investors that substantial amounts of the profits realized by the fraudulent investment program were used to finance charitable and religious programs operated by GMI and its affiliated entities.

19. It was further a part of the conspiracy that the defendants, and others, would and did invest only a small percentage of funds they received from victim investors.

20. It was further a part of the conspiracy that the defendants, and others, would and did attempt to mislead, and evade the jurisdiction of, state regulatory agencies by fraudulently characterizing each payment into the fraudulent investment program as a charitable contribution or gift to the church.

21. It was further a part of the conspiracy that the defendants, and others, would and did deal extensively in United States currency in order to avoid creating a paper trail and to conceal the fact that large amounts of victim investors' money was not being invested.

22. It was further a part of the conspiracy that the defendants, and others, in order to execute their scheme, would and did cause victim investors to use the United States mails to transmit funds to the fraudulent investment program and would and did transmit money, account statements, and promotional literature to victim investors through the United States mails.

23. It was further a part of the conspiracy that the defendants, and others, in order to promote their fraudulent scheme, would and did withdraw large amounts of investor funds, in United States currency, which they used to make periodic payments to earlier investors and to pay commissions to the directors and other conspirators.

24. It was further a part of the conspiracy that the defendants, and others, would and did withdraw investor funds from the fraudulent investment program's bank accounts in amounts greater than $10,000.

25. It was further a part of the conspiracy that the defendants, and others, would and did conduct their activities in a manner calculated to conceal and cover-up the fraudulent nature of the fraudulent investment program and to mislead and deceive victim investors, state regulatory authorities, and state and federal law enforcement agents.

D. Overt Acts

26. In furtherance of the conspiracy and to effect the objects thereof, the conspirators caused the following overt acts, among others, to be committed within the Middle District of Florida, and elsewhere:

(1) On or about November 18, 1994, defendant, BETTY PAYNE, cashed a check in the amount of $9,000 at Glendale Federal Bank.

(2) In or about December 1994, defendant, GERALD PAYNE, helped author and caused to be mailed copies

of the "Greater Share News" for the month of December 1994 which described the terms of the fraudulent investment program.

(3) On or about December 19, 1994, defendant, GERALD PAYNE, cashed two checks, each in the amount of $9,000, at Glendale Federal Bank.

(4) On or about December 20, 1994, defendant, GERALD PAYNE, cashed two checks, each in the amount of $9,000, at Glendale Federal Bank.

(5) On or about December 21, 1994, defendant, GERALD PAYNE, cashed one check in the amount of $9,000 at Glendale Federal Bank.

(6) On or about April 26, 1995, defendant, BETTY PAYNE, cashed a check in the amount of $100,000 at First Union Bank.

(7) In or about September 1995, defendant, JAMES R. CHAMBERS, met with Howard Brinkerhoff and solicited his participation in the fraudulent investment program.

(8) In or about early 1996, Randy Hester, an employee of GMI, delivered to the Tampa Airport post office branch envelopes stuffed with cash payments bound for Greater Ministries victim investors.

(9) In or about 1996, defendant, DAVID WHITFIELD, received $400,000 in cash from Best Bank and transported it from Colorado to Florida.

(10) In or about March 1996, defendant, JAMES R. CHAMBERS, received "gas money" in an amount in excess of $26,000.

(11) In or about May 1996, defendant, GERALD PAYNE, caused the distribution and mailing of the "Greater Share News" issue of May 1996.

(12) In or about June 1996, defendant, JAMES R. CHAMBERS, delivered a cash payment to victim investor Brad Groves.

(13) In or about June 1996, defendant, GERALD PAYNE, caused the mailing of literature promoting the "Greater Trust Gift Exchange".

(14) On or about August 12, 1996, defendant, JAMES R. CHAMBERS, made false and misleading statements to federal agents and denied that he had received from GMI any amount of "gas money" based upon a percentage of the funds which victim investors entered into the fraudulent investment program.

(15) On or about October 18, 1996, defendant, GERALD PAYNE, caused the transmission by wire of funds from Hamilton Bank, a financial institution located in the State of Florida, to Best Bank, a financial institution located in the State of Colorado.

(16) On or about April 25, 1997, defendants, GERALD PAYNE, BETTY PAYNE, ANDREW J. KRISHAK, HAYWOOD EUDON HALL, a/k/a DON HALL, and PATRICK TALBERT, attended and participated in a fund raising meeting in Pennsylvania on behalf of the fraudulent investment program.

(17) On or about April 25, 1997, conspirators handed out an instruction sheet detailing "Questions for Use If Stopped by Any Government Agent" to audience members at a promotional meeting in Pennsylvania.

(18) On or about June 6, 1997, defendants, GERALD PAYNE, HAYWOOD EUDON HALL, a/k/a DON HALL, and PATRICK TALBERT attended and participated in a fund raising meeting in Ohio on behalf of the fraudulent investment program.

(19) In or about November 1998, defendant, GERALD PAYNE, authorized the purging of GMI records relating to the fraudulent investment program.

(20) On or about December 14, 1998, defendant, DAVID WHITFIELD, wrote an open letter discussing changes in the fraudulent investment program's procedures and caused that letter to be distributed to victim investors.

All in violation of Title 18, United States Code, Section 371.

COUNT TWO
(THE MONEY LAUNDERING CONSPIRACY)

A. Introduction

1. The grand jury realleges and incorporates by this reference paragraphs 1 through 9 of Count One of this Indictment in their entirety as though fully set forth herein.

B. The Conspiracy

2. Beginning at least as early as March 1993, and continuing through in or about January 1999, in the Middle District of Florida, and elsewhere,

GERALD PAYNE, BETTY PAYNE, PATRICK TALBERT,HAYWOOD EUDON HALL, a/k/a DON HALL, DAVID WHITFIELD, ANDREW J. KRISHAK, and JAMES R. CHAMBERS,

defendants herein, did knowingly and willfully combine, conspire, confederate and agree with each other and with other persons both known and unknown to the grand jury, to:

(A) knowingly conduct and attempt to conduct a financial transaction involving the proceeds of a specified unlawful activity, that is, mail fraud, in violation of Title 18, United States Code, Sections 1341, with the intent to promote the

carrying on of such specified unlawful activities and with knowledge that the property involved represents the proceeds of some form of unlawful activity, in violation of Title 18, United States Code, Section 1956(a)(1)(A)(i); and

(B) knowingly engage in and attempt to engage in monetary transactions, affecting interstate commerce, in criminally derived property of a value greater than $10,000, which was derived from specified unlawful activity, that is, mail fraud, in violation of Title 18, United States Code, Section 1341, in violation of Title 18, United States Code, Section 1957.

C. Manner and Means

3. The substance of the conspiracy and its manner and means are described in Paragraphs 11 though 25 of Count One of this Indictment, the allegations of which are realleged and incorporated by this reference as though fully set forth herein.

All in violation of Title 18, United States Code, Section 1956(h).

COUNTS THREE THROUGH SEVEN
(THE MAIL FRAUD COUNTS)

A. Introduction

1. The grand jury realleges and incorporates by this reference paragraphs 1 through 9 of Count One of this Indictment in their entirety as though fully set forth herein.

B. The Scheme

2. Beginning as least as early as March 1993, and continuing through January 1999, in the Middle District of Florida, and elsewhere,

GERALD PAYNE, BETTY PAYNE, PATRICK TALBERT, HAYWOOD EUDON HALL, a/k/a DON HALL, DAVID WHITFIELD, ANDREW J. KRISHAK, and JAMES R. CHAMBERS,

defendants herein, knowingly devised and intended to devise a scheme and artifice to defraud, and for obtaining money and property from, victim investors by means of false and fraudulent pretenses, representations and promises.

C. Manner and Means

3. The substance of the scheme and artifice, and its manner and means are described in paragraphs 11 through 25 of Count One of this Indictment, the allegations of which are incorporated by this reference as though fully set forth herein.

D. Execution of the Scheme

4. On or about the dates set forth below, in the Middle District of Florida, and elsewhere, for the purpose of executing the aforementioned scheme and artifice, and attempting to do so, the defendants did knowingly cause to be delivered by United States mail, according to the directions

thereon, envelopes bearing the addresses and containing the material set forth below:

Count	Date	Address	Material
THREE	3/16/96	Louis Phillips 17018 Crowley Road Odessa, Florida	Newsletter, statement of account, U.S. currency
FOUR	10/15/96	Sheldon Campbell 7152 Indian Bow Lane Sarasota, Florida	Newsletter, statement of account, U.S. currency
FIVE	3/15/97	Edith Thomas 5836 Fall River Drive New Port Richey, Florida	Newsletter, statement of account, U.S. currency
SIX	11/13/97	Lynn Hampton 3125 Thorn Hill Road Winter Haven, Florida	Copy of donation, statement of account.
SEVEN	5/14/98	Lynn Hampton 3125 Thorn Hill Road Winter Haven, Florida	Statement of account, U.S. currency.

All in violation of Title 18, United States Code, Sections 1341 and 2.

COUNTS EIGHT THROUGH TWELVE
(THE MONEY LAUNDERING COUNTS)

On or about the dates set forth below, in the Middle District of Florida,

GERALD PAYNE, BETTY PAYNE, PATRICK TALBERT, HAYWOOD EUDON HALL, a/k/a DON HALL, DAVID WHITFIELD, ANDREW J. KRISHAK, and JAMES R. CHAMBERS,

defendants herein, knowing that the property involved in the financial transactions set forth below represented the proceeds of some form of unlawful activity, knowingly and willfully conducted, attempted to conduct and caused to be conducted, financial transactions affecting interstate and foreign commerce, ' which financial transactions involved the

proceeds of a specified unlawful activity, that is, mail fraud, in violation of Title 18, United States Code, Section 1341, with the intent to promote the carrying on of said specified unlawful activity:

Count	Date	Transaction
EIGHT	4/26/95	Cashing of a check in the amount of $100,000 drawn on First Union Bank account number 2090001418036.
NINE	5/18/95	Cashing of a check in the amount of $100,000 drawn on First Union Bank account number 2090001418036.
TEN	5/23/95	Cashing of a check in the amount of $100,000 drawn on First Union Bank account number 2090001418036.
ELEVEN	6/7/95	Cashing of a check in the amount of $50,000 drawn on First Union Bank account number 2090001418036.
TWELVE	6/20/95	Cashing of a check in the amount of $100,000 drawn on First Union Bank account number 2090001418036.

All in violation of Title 18, United States Code, Section 1956(a)(1)(A)(I).

COUNTS THIRTEEN THROUGH SEVENTEEN
(THE UNLAWFUL MONETARY
TRANSACTION COUNTS)

On or about the dates listed below, in the Middle District of Florida,

GERALD PAYNE,
BETTY PAYNE,
PATRICK TALBERT,
HAYWOOD EUDON HALL, a/k/a DON HALL,
DAVID WHITFIELD,
ANDREW J. KRISHAK,
and
JAMES R. CHAMBERS,

defendants herein, did knowingly and willfully engage in and attempt to engage in the monetary transactions set forth below, which transactions affected interstate commerce, in criminally derived property of a value greater than $10,000, such property having been derived from a specified unlawful activity, that is, mail fraud, in violation of Title 18, United States Code, Section 1341:

Count	Date	Transaction
THIRTEEN	1/25/95	Cashing of a check in the amount of $100,000 drawn on Glendale Federal Bank account number 061006584003.
FOURTEEN	5/3/95	Cashing of a check in the amount of $100,000 drawn on First Union Bank account number 2090001418036.
FIFTEEN	5/31/95	Cashing of a check in the amount of $55,600 drawn on First Union Bank account number 2090001418036.

SIXTEEN	6/27/95	Cashing of a check in the amount of $100,000 drawn on First Union Bank account number 2090001418036.
SEVENTEEN	7/12/95	Cashing of a check in the amount of $100,000 drawn on First Union Bank account number 2090001418036.

All in violation of Title 18, United States Code, Sections 1957 and 2.

(THE UNLAWFUL STRUCTURING OF FINANCIAL
TRANSACTION COUNTS)
COUNT EIGHTEEN

Beginning on or about November 8, 1994, and continuing through on or about November 10,1994, in the Middle District of Florida,

GERALD PAYNE,

defendant herein, knowingly and willfully and for the purpose of evading the reporting requirements of Section 5313(a) of Title 31, United States Code, and the regulations promulgated thereunder, structured and attempted to structure a financial transaction with one or more domestic financial institutions, that is, the withdrawal of approximately $54,000 in United States currency from Glendale Federal Bank.

All in violation of Title 31, United States Code, Section 5324(3).

COUNT NINETEEN

Beginning on or about November 15, 1994, and continuing through on or about November 18, 1994, in the Middle District of Florida,

GERALD PAYNE.

defendant herein, knowingly and willfully and for the purpose of evading the reporting requirements of Section 5313(a) of Title 31, United States Code, and the regulations promulgated thereunder, structured and attempted to structure a financial transaction with one or more domestic financial institutions, that is, the withdrawal of approximately $81,000 in United States currency from Glendale Federal Bank.

All in violation of Title 31, United States Code, Section 5324(3).

COUNT TWENTY

Beginning on or about December 16, 1994, and continuing through on or about December 27, 1994, in the Middle District of Florida,

GERALD PAYNE,

defendant herein, knowingly and willfully and for the purpose of evading the reporting requirements of Section 5313(a) of Title 31, United States Code, and the regulations promulgated thereunder, structured and attempted to structure a financial transaction with one or more domestic financial institutions, that is, the withdrawal of approximately $99,000 in United States currency from Glendale Federal Bank.

All in violation of Title 31, United States Code, Section 5324(3).

FORFEITURE

1. The allegations contained in Count Two and Counts Eight through Twenty of this Indictment are realleged by this reference, and fully incorporated herein for the purpose of alleging forfeitures to the United States of America, pursuant to the provisions of Title 18, United States Code, Section 982.

2. As a result of the offenses contained in Count Two and Counts Eight through Twenty of this Indictment, defendants GERALD PAYNE, BETTY PAYNE, PATRICK TALBERT, HAYWOOD EUDON HALL, a/k/a DON HALL, DAVID WHITFIELD, JAMES R. CHAMBERS, and ANDREW J. KRISHAK, shall forfeit to the United States all property, real and personal, involved in the offenses stated above and all property traceable to such property, including but not limited to any and all interest defendants or any one of them have in the below described property, whether, legal, equitable or beneficial:

All real, personal, and intangible property constituting the premises, but not the business operation, known as: Executive Inn, Rivermont, One Executive Blvd., Owensboro, Kentucky 42301.

3. If any of the property described above is subject to forfeiture, as a result of any act or omission of the defendants:

a) Cannot be located upon the exercise of due diligence;

b) Has been transferred or sold to, or deposited with, a third party;

c) Has been placed beyond the jurisdiction of the court;

d) Has been substantially diminished in value; or

e) Has been commingled with other property which cannot be divided without difficulty,

it is the intent of the United States pursuant to Title 18, United States Code, Section 982(b)(1), to seek forfeiture of any other property of said defendants up to the value of the above-forfeitable property.

All in violation of Title 18, United States Code, Sections 982, 1956 and 1957, and Title 31, United States Code, Section 5324(3).

A TRUE BILL.

/s/ Thomas E. Sacks
THOMAS E. SACKS
FOREPERSON

CHARLES R. WILSON
United States Attorney

By: /s/ Robert A. Mosakowski
ROBERT A. MOSAKOWSKI
Assistant United States Attorney
United States Attorney No. 051

By: /s/ Jay L. Hoffer
JAY L. HOFFER
Assistant United States Attorney
Florida Bar No. 0910708

By: /s/ Robert T. Monk
ROBERT T. MONK
Assistant United States Attorney
United States Attorney No. 026
Chief, Economic Crimes Section

The Honorable James D. Whittemore's ruling on
Title 18, United States Code,
Section 1956(h) (DKT. 888, pp. 99-102)

[99] THE COURT: Until Title 21 came along, right? I mean, that wasn't a traditional conspiracy, it was a Congress intended to construct at least an act, a drug conspiracy statute. I am not trying to put you on the spot but, you know, I understand the principal. But when you are dealing with essential elements of a criminal statute, I am not sure that the Court has the judicial prerogative to engage in that type of analysis given the Supreme Court's decision in *Shabani* and the lack of reference to any overt act in the 1956(h) conspiracy.

[100] I am a little concerned about the reference in the Quantaro case by the Eleventh Circuit, but I think Mr. Mosakowski correctly points out that that wasn't really an issue in the case. It didn't approve or disapprove, it just recited those instructions.

It appears then that unless anybody has got any other cases, we have got the Sixth, Fifth and Eighth Circuits aligned in requiring the commission of an overt act in a 1956(h) conspiracy. We have the Ninth Circuit and the District Court in the Eastern District of New York not requiring an overt act. And then by analogy the rationale of *Shabani*.

And I will read right from that opinion. In discussing 21 U.S.C. Section 846 the court observed the language neither—excuse me, the language of neither version requires that an overt act be committed to further the conspiracy and we have not inferred such a requirement from congressional silence and other conspiracy statutes.

The *Tam* decision relies on that language in rejecting the argument that the money laundering conspiracy statute requires an overt act.

The cases that have found that the overt act is required do not discuss the *Shabani* decision. So when you get right down to the bottom line. *United* [101] *States versus Tam* is the only circuit opinion that expressly addresses the issue and also addresses the rationale in *Shabani*. It looks like it in the event of an appellate review. there will be a good issue here.

I am finding based on *United States versus Tam* and *United States versus Shabani*. S-H-A-B-A-N-I. United States Supreme Court decision reported at 513 United States Reporter. Page 10. that the plain language of Section 1956(h) does not require an overt act. And I cannot infer such a requirement from the absence of that. That didn't sound right but they use the phrase congressional silence and other conspiracy statutes.

I will in that ruling recognize the recitation of the District Court instructions in *United States versus Quantaro* at 165 F. 3rd. 831. but note that the Court did not expressly address the requirement of an overt act one way or the other. It simply recited those instructions as a part of its decision on the collateral estoppel issue.

And in the Eleventh Circuit decision. United States versus Tokars. T-O-K-A-R-S. 95 F. 3rd. 1520. that decision likewise did not expressly address the issue. It simply recited the argument of the defendant as it pertained to the sufficiency of the evidence.

It appears. therefore. that the Government's [102] instruction should be given. Just for the record. Mr. Mosakowski. what instruction was that?

MR. MOSAKOWSKI: I think it was 18. Judge.

THE COURT: Eighteen?

MR. MOSAKOWSKI: I think so.

THE COURT: I just want to have my draft in front of me as we speak.

MR. MOSAKOWSKI: Yeah. it's 18. Judge.

THE COURT: Okay. So that will be given with the—there were two or three just typographical errors.

Jury instruction for Title 18, United States Code, Section 1956(h) and Section 1956(a)(1)(A)(I) (Dkt. 890, pp. 154-159)

[154] Count Two of the indictment charges that each defendant participated in a separate conspiracy offense than what was charged in Count One. So Count Two charges a separate conspiracy offense from Count One.

Title 18, United States Code, Section 1956(h), makes it a crime for anyone to conspire with someone else to commit any offense defined in Section, 1956 or Section 1957.

In this case, the defendants are charged with, conspiring to launder and to engage in unlawful monetary transactions with the proceeds or funds represented to be the proceeds of a mail fraud scheme.

A "conspiracy" under Title 18, United States Code, Section 1956(h), is a combination or agreement of two or more persons to join together to accomplish some unlawful purpose. It's a kind of partnership in crime in which each member becomes the agent for every other member.

In order to establish a conspiracy offense under this section, it is not necessary for the Government to prove that all of the people named in the indictment were members of the scheme; or that those who [155] were members had entered into any formal type of agreement; or that the members had planned together all of the details of the scheme that the indictment charges would be carried out in an effort to commit the intended crime.

In order for you to find any defendant guilty of this crime, you must be convinced that the Government has proven each of the following elements beyond a reasonable doubt: First, that two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment; and, second, that

the defendant under consideration knowingly and willfully became a member-of such conspiracy.

One may become a member of a conspiracy without knowing all of the details of the unlawful scheme or the identities of all of the other alleged co-conspirators. If a defendant understands the unlawful nature of a plan or scheme on one occasion, that is sufficient to convict that defendant for conspiracy, even though that defendant did not participate before and even though the defendant played only a minor part.

Of course, mere presence at the scene of a transaction or event, or the mere fact that persons may have associated with each other and may have assembled [156] together and discussed common aims and interests does not necessarily establish proof of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of a conspiracy, does not thereby become a conspirator.

In your consideration of the conspiracy offense alleged in Count Two of the indictment, you should first determine from all the evidence and testimony whether or not a conspiracy existed at all. If you conclude that a conspiracy did exist as alleged, you should next determine whether or not a defendant under consideration knowingly and willfully became a member of that conspiracy.

In this instance, with regard to the alleged conspiracy, the indictment charges that the defendants conspired to commit two separate, substantive crimes or offenses.

In such a case, it's not necessary for the Government to prove that the defendants under consideration willfully conspired to commit all of the substantive offenses. It would be sufficient if the Government proves, beyond a reasonable doubt, that the defendants willfully conspired with someone else to commit one of those offenses; but, in that event, in

order to return a verdict of guilty, you must unanimously [157] agree upon which of the offenses the defendants conspired to commit.

Title 18, United States Code, Section 1956(a)(1)(A)(I), makes it a federal crime or offense for anyone to knowingly engage in certain kinds of financial transactions commonly known as money laundering.

A defendant can be found guilty of that offense only if all of the following facts are proven by the Government beyond a reasonable doubt. The first element is that the defendant knowingly and willfully conducted or attempted to conduct a financial transaction, as defined subsequent; second, that the defendant knew that the funds or property involved in the financial transaction represented the proceeds of some unlawful activity; third, that the funds or property involved in the financial transaction did in fact represent proceeds of specified unlawful activity—in this case the proceeds of the mail fraud scheme; and fourth, that the defendant engaged in the financial transaction with the intent to promote the carrying on of such specified unlawful activity.

The term "conduct" means initiating, concluding, or participating in initiating or concluding a transaction.

The term "transaction" means a purchase, a [158] sale, loan, pledge, gift, transfer, delivery or other disposition of funds or property; and, with respect to a financial institution, includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or any other monetary instrument, or use of a safety deposit box.

The term "financial transaction" means a transaction which in any way or degree affects interstate or foreign commerce involving the movement of funds by wire or other means.

A "financial transaction" can also mean a transaction which in any way or degree affects interstate or foreign commerce involving one or more monetary instruments, which includes coin or currency of any country, travelers or personal checks, bank checks, money orders, or investment securities or negotiable instruments in such form that title thereto passes upon delivery.

Or a "financial transaction" could mean a transaction which in any way or degree affects interstate commerce or foreign commerce involving the transfer of title to any real property, meaning real estate, vehicle, vessel, or aircraft.

Or a "financial transaction" may mean a [159] transaction involving the use of a financial institution which is engaged in or the activities of which affect interstate or foreign commerce in any way or degree.

The term "financial institution" includes a bank.

The term "interstate or foreign commerce" includes any commercial activity that involves transportation or communication between places in two or more states or between some place in the United States and some place outside the United States.

The term "knowing that the funds or property involved in the financial transaction represents the proceeds of some form of unlawful activity" means that the defendant knew that the funds or property represented proceeds from some form, though not necessarily which form, of a felony offense under state or federal law.

And finally, the term "specified unlawful activity" means, in this case, a mail fraud scheme.

Judgment in a Criminal Case, 8:99-CR-78-T-27MSS,
Haywood Eudon Hall, March 29, 2004 (Dkt. 1032)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

[Filed Mar. 19, 2001]

Case Number: 8:99-CR-78-T-27MSS
USM Number: 38296-018

UNITED STATES OF AMERICA,

vs.

HAYWOOD EUDON HALL, a/k/a DON HALL,
Defendant.

THE DEFENDANT:

__ pleaded guilty to count(s) of the

__ pleaded nolo contendere to count(s) which was accepted by the court.

X was found guilty on count(s) 1, 2, 4, 6, and 7 after a plea of not guilty.

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 § 371	Conspiracy to Commit Mail Fraud, Wire Fraud, and to Transport Property Taken by Fraud Across State Lines	1/99	One
18 § 1956(h)	Conspiracy to Commit Money Laundering	1/99	Two
18 § 1341	Mail Fraud	10/15/96	Four
18 § 1341	Mail Fraud	11/13/97	Six
18 § 1341	Mail Fraud	5/14/98	Seven

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

X The defendant has been found not guilty on count(s) 3, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17.

__ Count(s) (s) (are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in economic circumstances.

Date of Imposition of Sentence: March 19, 2004

/s/ James D. Whittemore
JAMES D. WHITTEMORE
UNITED STATES DISTRICT JUDGE

Date: March 19th, 2004.

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of ONE HUNDRED THIRTY-SEVEN (137) MONTHS. Said term consists of SIXTY (60) MONTHS as to Counts 1, 4, 6, and 7, CONCURRENT; and, SEVENTY-SEVEN (77) MONTHS as to Count 2, CONSECUTIVE to Counts 1, 4, 6, and 7.

X The court makes the following recommendations to the Bureau of Prisons: The Court recommends confinement at Coleman.

X The defendant is remanded to the custody of the United States Marshal.

__ The defendant shall surrender to the United States Marshal for this district.
__ at __ a.m./p.m. on __.
__ as notified by the United States Marshall.

__ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
__ before 2 p.m. on __.
__ as notified by the United States Marshall
__ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at_____, with a certified copy of this judgment.

_____
UNITED STATES MARSHALL

By: _____
Deputy Marshall

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS as to Counts 1, 2, 4, 6, and 7, CONCURRENT.

The defendant shall report to the probation office in the district to which defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug test thereafter, as determined by the court.

X The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable).

__ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable).

__ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable).

__ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works or is a student, as directed by the probation officer. (Check, if applicable).

__ The defendant shall participate in an approved program for domestic violence. (Check, if applicable).

If this judgment imposes a fine or restitution it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependants and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation office at least ten days prior to any change in residence or employment;

The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

X The defendant shall provide the probation officer access to any requested financial information.

X The defendant shall be prohibited from incurring new credit charges, opening additional lines of credit, acquisitions or obligating himself for any major purchases, or attempting

to do so, without the express prior approval of the probation officer.

X The defendant shall perform 400 hours of community service during each year of supervision on such terms as directed by the probation officer. This community service may be substituted on an hourly basis for gainful employment where he is paid a wage. The defendant may also substitute ministry work with inmates in the federal and state prison system, outside the confines of a church setting.

X The defendant shall refrain from engaging in any employment related to financial investing involving charitable religious causes without the express permission of the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Total Restitution
Totals	$ 500.00	$ Waived	$85,030,412.00

__ The determination of restitution is deferred until___. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

X The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C.§ 3664(i), all nonfederal victims must be paid before the United States.

Name of Payee	Amount of restitution ordered
Mr. Kevin O'Halloran Office of the Chapter 11 of the Trustee, Greater Ministries International, Inc. P.O. Box 723657 Atlanta, Georgia 31139	$85,030,412.00

* To be made jointly and severally with co-defendants Gerald Payne, Betty Payne, Patrick Talbert, and David Whitfield.

To the extent that any victim receives compensation as a result of the bankruptcy proceedings, each victim's loss amount shall, for purposes of this Order of restitution, be reduced by the amount so recovered, pursuant to 18 U.S.C. § 3664(f)(2)(A).

(See Court's Order dated November 5, 2001, attached)

Totals: $___ $___

__ Restitution amount ordered pursuant to plea agreement $ _____.

__ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the day of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

__ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

__the interest requirement is waived for the __ fine __ restitution.

__ the interest requirement for the __ fine __ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for the

offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. __ Lump sum payment of $__ due immediately, balance due __ not later than_____, or __ in accordance __ C, __ D, E or __ F below; or

B. X Payment to begin immediately (may be combined with __ C, __ D, or X F below); or

C. Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of ____ (e.g., months or years), to commence ____ days (e.g., 30 or 60 days) after the date of this judgment; or

D. __ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $____ over a period of ____ (e.g., months or years), to commence ____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E. __ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time, or

F. X Special instructions regarding the payment of criminal monetary penalties:

The defendant shall immediately begin making nominal payments pursuant to 18 U.S.C. § 3664(f)(3)(B) and shall participate in the Bureau of Prisons' Inmate Financial Responsibility Program.

The Court reserves jurisdiction to determine monthly payment amounts if an agreement is not reached.

Unless the court has expressly ordered otherwise, if this judgment imposes a period of imprisonment payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

X Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

HAYWOOD EUDON HALL, Gerald Payne, Betty Payne, Patrick Talbert, and David Whitfield. 8:99-CR-78-T-27MSS
$85,030,412.00 – Total amount

__ The defendant shall pay the cost of prosecution.

__ The defendant shall pay the following court cost(s):

__ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court cost.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

[Filed Nov. 5, 2001]

Case No. 8:99-CR-78-T-27MSS

UNITED STATES OF AMERICA,

vs.

GERALD PAYNE; *et al.*,

ORDER OF RESTITUTION

PURSUANT TO 18 U.S.C. § 3663A and § 3664, this Court conducted evidentiary proceedings on October 18, 2001 and November 1, 2001, for the purpose of determining appropriate restitution. Upon consideration of the evidence presented, together with arguments of the parties, the Court

FINDS AND CONCLUDES:

1. At sentencing, given the number of defendants, the scope of the criminal activities of which these Defendants were convicted, the extent of the monetary fraud established at trial and the complexities involved in determining restitution in this case, the Court reserved jurisdiction to determine the victims' losses. It was apparent to the Court that the victims' losses were not ascertainable within the time contemplated by § 3664(d)(5). The Court has now conducted evidentiary proceedings during which, in accordance with its burden of demonstrating the amount of loss sustained by the victims as a result of the offense by the preponderance of the evidence, the Government presented the testimony of Kevin O'Halloran, who has been and is the appointed Chapter 11 Trustee for Greater Ministries International, Greater Ministries International, the vehicle through which the Defendants perpetrated their fraudulent activities, was placed in involuntary bankruptcy prior to the trial of this cause. In O'Halloran's capacity as Chapter 11 Trustee, he has accounted for assets of the bankrupt estate, identified creditors and otherwise marshaled the assets and liabilities of the bankrupt estate. Over 24,000 individual creditors and vendors have been identified by O'Halloran as having participated in the operations of Greater Ministries and in excess of 6,600 proof of claims were filed in the bankruptcy proceeding. Those claims totaled $410,395,496.00 and the Trustee has or will be objecting to $323,427,065.00 of the submitted claims, which yields approximately $86,968,431.00 in potential allowable claims, of which $85,030,412.00 represents victim losses, meaning those individuals or entities who invested in the scheme perpetuated by the Defendants. O'Halloran was credible and persuasive in establishing each victim's loss.

2. At the request of the U.S. Probation Office, consistent with its duties pursuant to 18 U.S.C. § 3664(a), O'Halloran prepared a summary, listing each individual who had filed a proofof claim in the bankruptcy proceedings or for whom documentation established a claim in the bankruptcy proceeding and which O'Halloran either agreed to or would not object to, together with the amount representing each claimant's loss. This summary, together with copies of each individual's claim of lien, listing the individual, his/her address and amount claimed was received into evidence as Court's Exhibit #1, which the Court hereby incorporates as part of this Order. O'Halloran and his staff reviewed each proof of claim and determined their accuracy for purposes of establishing each individual's loss. During this process, O'Halloran eliminated duplicated claims, excessive claims and made appropriate adjustments to arrive at a net loss amount for each claimant. For example, in the event a claimant acknowledged or documentation established that the claimant had received cash from Greater Ministries to offset the amount the in-

dividual had invested or "gifted", as the Defendants are fond of saying, O'Halloran would subtract or adjust the claim by the amount received to arrive at an accurate loss amount.

3. In sum, the Court is persuaded by the greater weight of the evidence, specifically O'Halloran's testimony, that Court's Exhibit # 1 constitutes a reasonable estimate of each victim's loss, given all available information. *United States v. Futrell*, 209 F.3d 1286 (11th Cir. 2000). As *Futrell* acknowledges and as evidenced in this case, it is simply not practical or feasible to determine with precision the amount of loss in this case, given the scope of the fraud, the amount of money which flowed through Greater Ministries and the complexity of the Ponzi scheme these Defendants have been found guilty of participating in.

4. The Court has considered those factors set forth in 18 U.S.C. § 3663(a)(1)(B) and finds that the total loss amount for the victims who are identified in Court's Exhibit #1 is $85,030,412.00. Those individuals identified in O'Halloran's summary (and supporting documents) are "victims" within the definition of § 3663(a)(2) and § 3663A(2) in that each has directly and proximately been harmed as a result of the commission of the offenses for which these Defendants have been convicted and for which restitution must be ordered.

5. At sentencing, the Court adopted the undisputed statements of fact in each Defendant's Presentence Investigation Report. In each instance, the Defendants were individually determined to be indigent and without the financial means of making payments other than nominal payments pursuant to 18 U.S.C. § 3664(f)(3)(B).

Accordingly, it is

ORDERED AND ADJUDGED:

1. Each Defendant shall, jointly and severally, make restitution to each victim in the full amount of each victim's loss as set forth in Court's Exhibit #1, incorporated herein by reference.[1]

2. Each Defendant, with the exception of Patrick Talbert, who is presently in the custody of the State of Florida, shall immediately begin making nominal payments pursuant to 18 U.S.C. § 3664(f)(3)(B)and shall participate in the Bureau of Prisons' Inmate Financial Responsibility Program; With respect to Defendant Talbert, upon being taken into custody by the United States Bureau of Prisons, he shall likewise begin making nominal monthly payments and participate in the Bureau of Prisons' Inmate Financial Responsibility Program. In this regard, the Court finds from the facts in the record that the economic circumstances of each Defendant do not allow the payment of any amount of a restitution order and do not allow for payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

3. To the extent that any victim receives compensation as a result of the bankruptcy proceedings, each victim's loss amount shall, for purposes of this Order of restitution, be reduced by the amount so recovered, pursuant to 18 U.S.C. § 3664(f)(2)(A).

4. The Clerk is directed to amend the Final Judgments pursuant to the terms of this Order.

5. The United States of America, by and through its Assistant United States Attorneys, shall prepare a typewritten list including the names, addresses, amount of loss and

---

[1] As there are more than 4,000 victims identified by O'Halloran's analysis, it is not practicable to list each victim and their individual loss in this Order.

bankruptcy proof of claim number for filing in this cause, from information contained in Court's Exhibit #1.[2]

DONE AND ORDERED in chambers this 2nd day of November, 2001.

/s/ James D. Whittemore
JAMES D. WHITTEMORE
United States District Judge

Copies to:
Counsel/Pro Se parties of Record

[2] The Court considers the reduction of the names, addresses and amounts of loss for each victim to a written list to be a ministerial act which is not intended to amend the final judgments in this cause. The list will assist the parties and the U.S. Probation Officers in their supervision of these Defendants and enforcement and monitoring of restitution payments made pursuant to this Order.

STATEMENT OF REASONS
(Not for Public Disclosure)

X THE COURT ADOPTS THE PRESENTENCE REPORT AND GUIDELINE APPLICATIONS WITHOUT CHANGE.

OR

☐ THE COURT ADOPTS THE PRESENTENE REPORT AND GUIDELINE APPLICATIONS BUT WITH THESE CHANGES: (Use Page 3, if necessary.)

- ☐ Chapter Two of the U.S.S.G. Manual determinations by court (including changes to base offense level or specific offense characteristics):
- ☐ Chapter Three of the U.S.S.G. Manual adjustment determinations by court (including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility):
- ☐ Chapter Four of the U.S.S.G. Manual determinations by court (including changes to changes to criminal history category or scores, career offender, or criminal livelihood determinations):

☐ THE COURT ADOPTS THE PRESENTENCE REPORT WITH THESE COMMENTS OR FINDINGS (including comments or factual findings concerning certain information in the presentence report that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions. Specify court comments or findings, including paragraphs in the presentence report.) (Use Page 3, if necessary.)

GUIDELINE RANGE DETERMINED BY THE COURT (BEFORE DEPARTURES):

Total Offense Level: 33
Criminal History Category: I
Imprisonment Range: 135 to 168 months
Supervised Released Range: 2 to 3 years
Fine Range: $17,500 to $120,000,000

☒ FINE WAIVED OR BELOW THE GUIDELINE RANGE BECAUSE OF INABILITY TO PAY.

☐ THE SENTENCE IS WITHIN THE GUIDELINE RANGE, THAT RANGE DOES NOT EXCEED 24 MONTHS AND THE COURT FINDS NO REASON TO SEPART.

OR

☒ THE SENTENCE IS WITHIN A GUIDELINE RANGE, THAT RANGE EXCEEDS 24 MONTHS, AND THE SPECIFIC SENTENCE IS IMPOSED FOR THESE REASONS: (Use Page 3, if necessary.)

The sentence meets the statutory purposes of sentencing.

STATEMENT OF REASONS
(Not for Public Disclosure)

ADDITIONAL PRESENTENCE REPORT AND GUIDELINE APPLICATION CHANGES
(If necessary.)

SPECIFIC SENTENCE IS IMPOSED FOR THESE REASONS
(If necessary.)

ADDITIONAL COMMENTS OR FINDINGS CONCERNING INFORMATION IN PRESENTENCE REPORT
(If necessary.)

ADDITIONAL REASONS FOR DEPARTING FROM THE GUIDELINE RANGE
(If necessary.)

Defendant's Soc. Sec. No.: 266-66-3819

Defendant's Date of Birth: April 15, 1941

Defendant's Residence Address: c/o Bureau of Prisons

_____

_____

Defendant's Mailing Address: Same

_____

_____

March 19, 2004
Date of Imposition of Judgment

/s/ J. Whittemore
Signature of Judge

James D. Whittemore
United States District Judge
Name and Title of Judge

3/19/04
Date Signed

(6) (6)

Nos. 03-1293 & 03-1294

Supreme Court, U.S.
FILED
AUG 25 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

DAVID WHITFIELD,

Petitioner,

v.

UNITED STATES OF AMERICA

HAYWOOD EUDON HALL,

Petitioner,

v.

UNITED STATES OF AMERICA

On Writs Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTION PRESENTED

Is commission of an overt act an element of the crime of conspiracy to commit money laundering under 18 U.S.C. 1956(h)?

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 349 F.3d 1320. Petitioner Hall's judgment of conviction on remand from the Eleventh Circuit appears in the joint appendix at page 26. Petitioner Whitfield's judgment of conviction is appended to his petition for certiorari at App. 6-17. The ruling of the district court is unpublished and appears in the joint appendix at pages 19-21.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 2003. Petitioner Whitfield filed his petition for writ of certiorari on March 5, 2004. Petitioner Hall filed his petition for writ of certiorari on March 10, 2004. This Court granted certiorari on June 21, 2004, and has jurisdiction to consider this matter pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18, Section 1956(h) provides:

> Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

Title 18, Section 1956(i) provides:

(i) Venue.

(1) Except as provided in paragraph (2), a prosecution for an offense under this section or section 1957 may be brought in –

(A) any district in which the financial or monetary transaction is conducted; or

(B) any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted.

(2) A prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought in the district where venue would lie for the completed offense under paragraph (1), or in any other district where an act in furtherance of the attempt or conspiracy took place.

(3) For purposes of this section, a transfer of funds from 1 place to another, by wire or any other means, shall constitute a single, continuing transaction. Any person who conducts (as that term is defined in subsection (c)(2)) any portion of the transaction may be charged in any district in which the transaction takes place.

STATEMENT OF THE CASE

The question presented by this case is whether commission of an overt act is an element of the crime of

conspiracy to launder money under 18 U.S.C. 1956 and 1957. The answer to that question is "yes," based on the nature of the underlying offense, the legislative history, and the statutory structure of the federal money laundering statutes.

1. The Money Laundering Statutes, 18 U.S.C. 1956 and 1957

Money laundering, in its generic sense, is the process by which a person attempts to disguise the criminal origin of money through one or more financial transactions. Until 1970, money laundering activities were neither controlled nor prohibited by federal statute or common law.[1]

In 1970, Congress enacted the first statute directed at money laundering, the Currency and Foreign Transactions Reporting Act (Bank Secrecy Act), Pub. L. No. 91-508, tit. II, 84 Stat. 1114. The 1970 Act required individuals and financial institutions to comply with a variety of reporting requirements. Congress thereafter passed the Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, now codified at 18 U.S.C. 1956 and 1957. The 1986 Act created new substantive offenses related to financial transactions that involved the proceeds of specified illegal activity.[2]

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[1] *See* Kelly Neal Carpenter, *Money Laundering*, 30 Am. Crim. L. Rev. 813, 814-15 (1993); Rachael Simonoff, Ratzlaf v. United States: *The Meaning of "Willful" and the Demands of Due Process*, 28 Colum. J.L. & Soc. Probs. 397, 409 (1995).

[2] For a general discussion of the statutes, *see* Mariano-Florentino Cuellar, *The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance*, 93 J. Crim. L. & Criminology 311 (2003).

In its original form, the Act did not contain its own conspiracy provision, but rather relied on the general federal conspiracy statute, 18 U.S.C. 371. The maximum penalty for conviction under Section 371 – for conspiracy to launder money, or for any other conspiracy – was five years imprisonment.

In 1992, as part of the Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, 106 Stat. 4044,[3] Congress enacted the provision now codified in 18 U.S.C. 1956(h)[4] governing conspiracies:

> Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

As set forth in the conference report, the exclusive purpose of the provision was to "increase[] the penalty for the offense of conspiracy to commit money laundering under 19 [sic] U.S.C. 1956 or 1957 to the penalty for the substantive money laundering offense."[5]

In 2001, as part of the USA PATRIOT Act, Congress amended the money laundering laws in one additional way relevant to this case. In Section 1004 of the USA PATRIOT

[3] The Act also provided new procedures for civil forfeitures, expanded on the specified unlawful activities and financial transactions covered by 18 U.S.C. 1956 and 1957, and created some additional reporting requirements.

[4] Initially codified at Section 1956(g), it was subsequently corrected to Section 1956(h) by Pub. L. No. 103-322, § 330019(a)(2), 21 Stat. 2149 (1994).

[5] Conference Report, 102d Congress, 138 Cong. Rec. S17,904 (daily ed. Sept. 30, 1992).

Act, Congress enacted a specific money laundering venue provision, Section 1956(i), which lays venue for conspiracy prosecutions in the district where venue would lie for the completed offense or in any other district where an act in furtherance of the attempt or conspiracy took place.

2. Course of Proceedings Below

On March 12, 1999, petitioners Hall and Whitfield, along with five co-defendants, were arrested and charged in a multi-count indictment with a variety of criminal offenses stemming from their involvement in the Greater Ministries International Church ("GMIC"). GMIC operated and promoted the Faith Promises Program, which the government alleged to be a fraudulent investment program. J.A. 1-18.

Count One of the indictment charged the defendants with conspiring to commit mail fraud and wire fraud and transporting property taken by fraud across state lines in violation of 18 U.S.C. 371. J.A. 1-9.

Count Two, the count in question here, alleged a conspiracy to commit money laundering in violation of 18 U.S.C. 1956(h). This count incorporated by reference Count One's introductory material and the description of the "manner and means" by which the conspiracy was carried out, but it conspicuously failed to incorporate the overt acts set out in Count One or to allege any other overt acts in furtherance of the money laundering conspiracy. J.A. 9-10.

Counts Three through Seven charged the parties with committing mail fraud based on five acts of mailing newsletters, statements of accounts, and U.S. currency to

participants in the Faith Promises Program in violation of 18 U.S.C. 1341. J.A. 11-12.

Counts Eight through Twelve charged the parties with money laundering offenses based on five check-cashing transactions in violation of 18 U.S.C. 1957. J.A. 12-13. Counts Thirteen through Seventeen charged the parties with engaging in five unlawful monetary transactions based on five separate check-cashing transactions. J.A. 14-15.

At the close of the evidence, counsel for petitioners asked the district court to instruct the jurors that they could convict the defendants under Section 1956(h) only if they found that an overt act in furtherance of the alleged money laundering conspiracy had been committed. The court rejected this request, instead instructing the jury that the only two elements they needed to find to convict petitioners of money laundering conspiracy were, "[f]irst, that two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment; and [s]econd, that the defendant under consideration knowingly and willfully became a member of such conspiracy." J.A. 22-25.

The judge directed a verdict of "not guilty" as to all defendants on Count Five.

The jury convicted petitioner Whitfield of all remaining counts.

The jury convicted petitioner Hall of Counts One (conspiracy to commit mail fraud), Two (conspiracy to commit money laundering), Four, Six, and Seven (mail fraud counts). The jury acquitted petitioner Hall of every

money laundering and unlawful monetary transaction with which he was charged – Counts Eight through Seventeen – as well as Count Three (mail fraud). J.A. 26-27.

Petitioner Whitfield[6] was sentenced to 235 months' imprisonment, followed by thirty-six months of supervised release. Petitioner Hall was sentenced to 185 months' imprisonment, sixty-five months of which was attributable to the conviction for conspiracy to launder money, followed by thirty-six months of supervised release.

On appeal, petitioner Hall claimed legal error in the district court's failure to instruct the jury that commission of an overt act is an essential element of a money laundering conspiracy under Section 1956(h). Petitioner Whitfield adopted Hall's argument. Petitioner Hall also appealed his two-level sentencing enhancement under U.S.S.G. 3B1.3 for abusing a position of trust. The Eleventh Circuit agreed that the enhancement was in error and remanded the case to the district court for re-sentencing,[7] but it rejected petitioners' arguments regarding the elements of Section 1956(h). It held that Section 1956(h) was analogous to 21 U.S.C. 846, a drug conspiracy statute that this Court had held requires no proof of an overt act, *see United States* v. *Shabani*, 513 U.S. 10 (1994), and on that

[6] Both petitioners objected to various other sentencing enhancements before the district court, including the amount of loss, role in the offense, and sophisticated means enhancements. However this Court rules on the question presented specifically by this case, we ask that this Court dispose of this case consistent with its decisions in *United States* v. *Booker*, No. 04-104 (cert. granted Aug. 2, 2004), and *United States* v. *Fanfan*, No. 04-105 (cert. granted Aug. 2, 2004).

[7] On March 19, 2004, petitioner Hall was re-sentenced to serve 137 months in prison followed by 36 months of supervised release.

basis affirmed petitioners' convictions, concluding that "an overt act is not an essential element for conviction of conspiracy to commit money laundering." Pet. App. 7a.

This Court subsequently granted certiorari. *See* 124 S. Ct. 2872 (2004).

SUMMARY OF ARGUMENT

There is no dispute that, prior to 1992, conspiracy to launder money required commission of an overt act. The only question is whether, in enacting Section 1956(h) to enhance the penalties for money laundering conspiracies, Congress intended to eliminate this pre-existing requirement. The statute's structure, purpose, and legislative history all confirm that the enactment of Section 1956(h) was not intended to eliminate the overt act requirement that had applied to money laundering conspiracies when they were prosecuted under 18 U.S.C. 371, a requirement that had been uniformly and repeatedly applied to money laundering conspiracy prosecutions.

At the time Congress enacted Section 1956(h), it was well aware that money laundering conspiracy prosecutions required the commission of an overt act. If Congress had meant to change this well-established practice, it would have done so explicitly.

After the enactment of Section 1956(h), the overwhelming majority of courts continued to require the commission of an overt act in money laundering conspiracy prosecutions, and this majority view continued to prevail even after this Court's decision in *United States* v. *Shabani*, 513 U.S. 10 (1994). When Congress enacted a

series of other amendments to the money laundering statutes, it did nothing to disapprove the majority view. To the contrary, in 2001, when Congress enacted new venue provisions for money laundering cases, it expressly incorporated the overt act element in the provision regarding conspiracy prosecutions, 18 U.S.C. 1956(i)(2).

In holding that no overt act is required for a conviction for conspiracy to commit money laundering, the Eleventh Circuit relied on this Court's decision in *Shabani*. That decision, however, is inapposite because of critical differences between Section 1956(h) and 21 U.S.C. 846, the drug conspiracy statute at issue in *Shabani*. The structure, purpose, and history of the drug conspiracy statute differ significantly from those of the money laundering conspiracy statute. Prior to the enactment of Section 846, drug conspiracy prosecutions did not invariably require the commission of an overt act; prior to the enactment of Section 1956(h), money laundering conspiracies *always* required an overt act. Moreover, Congress intended to create a "specific offense" when it enacted Section 846, rather than a "penalty" provision as it did with Section 1956(h).

Further, *Shabani* was decided two years after the enactment of Section 1956(h); as such, Congress cannot be expected to have anticipated that language that had previously required the commission of an overt act would no longer be so interpreted. Finally, and unlike the case with respect to Section 846, Congress implicitly ratified the majority view requiring an overt act in money laundering conspiracy prosecutions by incorporating an overt act requirement into the venue provision it passed in 2001, while expressing no disapproval of the prevailing rule. To the extent there is any ambiguity in the meaning of

Section 1956(h), the rule of lenity dictates that the ambiguity must be resolved in petitioners' favor, and Section 1956(h) should be interpreted to require the commission of an overt act as an essential element of the offense.

ARGUMENT

I. THE GENESIS, LANGUAGE, LEGISLATIVE HISTORY, AND STATUTORY STRUCTURE OF THE MONEY LAUNDERING LAWS ALL DEMONSTRATE THAT COMMISSION OF AN OVERT ACT IS AN ESSENTIAL ELEMENT OF A MONEY LAUNDERING CONSPIRACY.

A. It is undisputed that before Section 1956(h) was enacted, a conviction for money laundering conspiracy required proof of an overt act.

Prior to the passage of Section 1956(h) in 1992, the commission of an overt act was a necessary element of the crime of money laundering conspiracy. Under the Money Laundering Control Act of 1986, money laundering conspiracies were prosecuted under 18 U.S.C. 371, the general federal conspiracy statute. *See, e.g.*, *United States* v. *Ursery*, 518 U.S. 267, 271 (1996); *United States* v. *Gilliam*, 975 F.2d 1050, 1052 (CA4 1992); *United States* v. *Ahmad*, 974 F.2d 1163, 1164 (CA9 1992); *United States* v. *Marsh*, 963 F.2d 72, 73 (CA5 1992); *United States* v. *Payne*, 962 F.2d 1228, 1229 (CA6 1992); *United States* v. *Costa*, 953 F.2d 753, 755 (CA2 1992); *United States* v. *Isabel*, 945 F.2d 1193, 1195 (CA1 1991); *United States* v. *Kelley*, 929 F.2d 582, 583 (CA10 1991); *United States* v. *Franklin*, 902 F.2d 501, 504 (CA7 1990). Because Section 371 contains an express overt act requirement, the courts of appeals

uniformly required proof of an overt act for money laundering conspiracies. *See, e.g.*, *United States* v. *Brown*, 972 F.2d 1380, 1381 (CA9 1992); *United States* v. *Long*, 977 F.2d 1264, 1266 (CA8 1992); *United States* v. *Fuller*, 974 F.2d 1474, 1476 (CA5 1992); *United States* v. *Stavroulakis*, 952 F.2d 686, 688 (CA2 1992).

B. Congress enacted Subsection 1956(h) solely to increase the penalty for money laundering conspiracies.

The legislative history surrounding the enactment of Section 1956(h) demonstrates that the sole purpose of Section 1956(h) was to increase the penalties for money laundering conspiracies. Congress did not intend to disturb the long-standing requirement that an overt act be proven as an element of the crime of conspiracy to commit money laundering.

Section 1956(h) was passed in 1992 as part of the Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, 106 Stat. 4044. Prior to its enactment, Congress had repeatedly considered increasing the penalty for money laundering conspiracies. Amendments to increase the penalty for money laundering conspiracies were considered by the Senate in the Omnibus Crime Act, S. 1970, 101st Cong. (1990); the Money Laundering Improvements Act of 1991, S. 1241, 102d Cong. (1991); the Money Laundering Improvements Act of 1991, S. 1665, 102d Cong.; the Comprehensive Deposit Insurance Reform and Taxpayer Protection Act, S. 543, 102d Cong. (1991); and the Federal Housing Enterprises Regulatory Reform Act, S. 2733, 102d Cong. (1992).

Similar efforts to increase the penalty for money laundering conspiracies were also considered by the House of Representatives. Indeed, the earlier bill on which the Annunzio-Wylie Act's money laundering conspiracy provision was based, *see* 138 Cong. Rec. H9802 (daily ed. Sept. 29, 1992) (statement of Rep. Annunzio), addressed the penalty for money laundering conspiracies simply by amending the general federal conspiracy statute to add a new subsection to 18 U.S.C. 371. That new section would have provided:

> (c) Punishment in Case of Conspiracy to Commit a Money Laundering Offense. – Notwithstanding the maximum punishment provided in subsection (a), if the offense, the commission of which is the object of the conspiracy, is an offense under section 1956 or 1957, the person conspiring to commit such offense shall be subject to the same penalties as the penalties prescribed under such sections for the offense.

137 Cong. Rec. H4203 (daily ed. June 10, 1991) (introduction of Money Laundering Enforcement Amendments of 1991, H.R. 26, 102d Cong.). As a subsection of Section 371, the sole effect of H.R. 26 would have been to increase the penalty for money laundering conspiracies.[8] It would have

[8] Given the multitude of conspiracy statutes that Congress has enacted, both pre- and post- Section 1956(h), none of which has resulted in amendments to Section 371 (*see infra* n.13), it is apparent that Congress's decision not to address money laundering conspiracies in Section 371 simply reflects its consistent choice to instead enact crime-specific conspiracy provisions. The legislative history of these statutes indicates Congress's central purpose: to make conspiracies to commit various offenses punishable by the same maximum penalty that is applicable to the substantive offense that is the object of the conspiracy. *See, e.g.*, 136 Cong. Rec. S6639 (daily ed. May 21, 1990) (statement of

(Continued on following page)

left undisturbed Section 371's definition of the crime of conspiracy and thus clearly would have preserved Section 371's express overt act requirement.[9]

At no point in any of the discussions or debates on the various proposed amendments or during consideration of the Annunzio-Wylie Bill did any member of Congress discuss the overt act requirement in connection with the passage of a money laundering conspiracy provision. Rather, Congress focused exclusively on increasing the penalties for the pre-existing offense of conspiracy to launder money. The money laundering conspiracy provision of the Act was Section 310 of H.R. 6048, which was titled simply "Penalty for Money Laundering Conspiracies." The section-by-section analysis described the money laundering conspiracy provision as follows: "This section increases the penalty for the offense of conspiracy to commit money laundering under 19 [sic] U.S.C. 1956 or 1957 to the penalty for the substantive money laundering

Sen. Biden) (describing his proposed provision as "a technical amendment to make consistent the penalty for money laundering conspiracies with *penalties for drug conspiracies*, which carry the same penalty as the offense that is the object of the conspiracy" (emphasis added)); 137 Cong. Rec. S12,235 (daily ed. Aug. 2, 1991) (statement of Sen. D'Amato) (describing his proposed provision as "rais[ing] the penalty for money laundering conspiracy from 5 years to whatever the penalty would be for the substantive offense that was the object of the conspiracy"). Nothing in these discussions – which referred interchangeably to conspiracy statutes that contained overt act requirements and statutes that omitted them – suggests that in changing the penalties for various conspiracies, Congress also meant to change the pre-existing elements.

[9] In September 1992, the House again revisited the issue of increased penalties for money laundering conspiracies as part of the Financial Institutions Enforcement Improvements Act, H.R. 6048, 102d Cong. (1992), before its eventual enactment in the Annunzio-Wylie Anti-Money Laundering Act.

offense." 138 Cong. Rec. S17,904 (daily ed. Oct. 8, 1992). Consistent with the prior labeling of this provision, the session law containing the new Section 1956(h) was entitled "Penalty for Money Laundering Conspiracies." Pub. L. No. 102-550, § 530, 106 Stat. 3672, 4066 (1992). In summarizing the bill, Representative Wylie, one of its chief architects and drafters, explained that Section 310 "increases the criminal penalties for money laundering conspiracies." 138 Cong. Rec. H9802 (daily ed. Sept. 29, 1992).

The conclusion that Section 1956(h) did nothing more than increase the penalty for money laundering conspiracies, and therefore does not redefine the elements of the crime, parallels this Court's analysis of the penalties for illegal re-entry prescribed by 8 U.S.C. 1326(b), in *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998). There, the petitioner pled guilty to illegal re-entry in violation of Section 1326 and argued that his sentencing judge could not impose an enhanced sentence based on his previous conviction for an aggravated felony, as authorized by 8 U.S.C. 1326(b)(2), because the indictment had not alleged this previous conviction. This Court rejected the argument, concluding that Section 1326(b) merely dealt with penalties and did not affect the substantive elements of any crime. In reaching this conclusion, the Court relied on several factors: first, the title of the statute, "Criminal penalties for reentry of certain deported aliens"; second, the section-by-section analysis stating that the provision "[i]ncreases [the] current penalty for illegal re-entry"; and third, statements by various members of Congress regarding how the statute would increase penalties. *Id.* at 234; *see also* Br. for the U.S. at 15, *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998) (No. 96-6839) ("[t]he title

corroborates the congressional intent"); *id.* at 22 (section-by-section analysis); *id.* at 22-23 (statements by members of Congress). And the Court emphasized that "the legislative history * * * speaks about, and only about, the creation of new penalties. * * * The history, to our knowledge, contains no language at all that indicates Congress intended to create a new substantive crime." 523 U.S. at 234; *see also* Br. for the U.S. at 23, *Almendarez-Torres* ("The circumstances surrounding enactment of Section 1326(b)(2) thus provide every indication that Congress intended it to authorize increased penalties for certain Section 1326(a) offenders, not to constitute a free-standing offense. The history repeatedly refers to the new subsections as establishing 'increased penalties.'"). In this case, the same factors are present and should lead to the same conclusion: Congress did not change the elements of the offense of conspiracy to launder money, but instead only changed the penalty.

C. Section 1956's structure further confirms that Section 1956(h) was intended solely to increase the penalty for money laundering conspiracies.

When Congress first enacted Section 1956 as part of the Money Laundering Control Act of 1986, Section 1956 contained two offenses set forth in Sections 1956(a)(1) and 1956(a)(2). When an additional substantive offense was added to Section 1956 as part of the Money Laundering Prosecution Improvements Act of 1988, Pub. L. No. 100-690, § 6465, 102 Stat. 4354, 4375, it was placed in Section

1956(a) as well.[10] Thus, to the extent that Congress intended to create new offenses and define their elements, it chose to do so in Section 1956(a).

Under the money laundering statutory scheme in effect when Section 1956(h) was enacted, Subsections (a)(1)-(3) of Section 1956 delineated the prohibited money laundering activities; Section 1956(b) set forth the civil forfeiture and monetary penalties associated with Section 1956 violations; Section 1956(c) defined the terms used in Subsections (a)(1), (2), and (3), including what constitutes "specified unlawful activity"; Subsection (d) explained the relationship between Section 1956 and existing laws; Subsection (e) identified the different federal agencies authorized to investigate these money laundering offenses; Subsection (f) established extraterritorial jurisdiction over U.S. citizens outside the country and non-U.S. citizens inside the country; and Subsection (g) required financial institutions to report employees who have been found guilty of violating the money laundering statutes. Congress added the conspiracy provision as Subsection (h), establishing the same punishment for conspiracies as for the offense the commission of which was the object of the conspiracy.

If Congress had intended the money laundering conspiracy provision to be another substantive offense rather than simply an increased penalty provision, it would have once again amended Section 1956(a) to add a new paragraph prohibiting money laundering conspiracies.

[10] "Section 1956(a) of title 18, United States Code, is amended by inserting after paragraph (a)(2) the following new paragraph: [listing the provision that would be codified at 18 U.S.C. 1956(a)(3)]."

Instead, it placed the provision for increasing the penalty for money laundering conspiracies in an entirely different section of the statute, following various jurisdictional and procedural subsections. Thus, the structure of Section 1956 demonstrates that the sole purpose of Section 1956(h) was to increase the penalty for money laundering conspiracies, not to create a substantive conspiracy offense or to otherwise alter the long-standing overt act requirement.

II. NOTHING IN THIS COURT'S DECISION IN *UNITED STATES V. SHABANI* UNDERMINES THE CONCLUSION THAT CONSPIRACY TO LAUNDER MONEY REQUIRES PROOF OF AN OVERT ACT.

The Eleventh Circuit's decision in this case rested almost entirely on this Court's decision in *United States* v. *Shabani*, 513 U.S. 10 (1994), which held that 21 U.S.C. 846, a drug conspiracy statute, does not require proof of an overt act. But the differences between the statutory scheme at issue in this case and that in *Shabani* undercut the conclusion that *Shabani* is controlling here.

First, unlike Section 1956(h), Section 846 was not passed against a legal background in which an overt act was clearly a necessary element of the crime of drug conspiracy. Prior to the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970, which enacted Section 846, drug conspiracies had been penalized for nearly two decades under the Boggs Act of 1951, Pub. L. No. 82-255, 65 Stat. 767, which federal courts regularly construed as not containing an overt act requirement. *See, e.g.*, *United States* v. *Bey*, 736 F.2d 891, 894 (CA3 1984); *United States* v. *De Jesus*, 520 F.2d 298, 301 (CA3 1975)

(adopting the holding of *United States* v. *De Viteri*, 350 F. Supp. 550, 552 (E.D.N.Y. 1972)); *Ewing* v. *United States*, 386 F.2d 10, 15 (CA9 1967) (adopting the holding of *United States* v. *Gardner*, 202 F. Supp. 256, 258 (N.D. Cal. 1962)); but *see Poliafico* v. *United States*, 237 F.2d 97, 105 (CA6 1956) (listing, without discussion, commission of an overt act as an element of a drug importation conspiracy); *United States* v. *McKenney*, 181 F. Supp. 143, 146 (S.D.N.Y. 1959) ("The [Boggs Act] simply related to the matter of punishment and did not create a new crime. The crime of conspiracy is defined only in section 371 of Title 18.").

Second, in contrast to Section 1956(h), the legislative history of Section 846 demonstrates that the drug conspiracy provision was intended not merely to increase the punishment for an existing crime, but also to ensure that "[a] conspiracy to commit violations of [certain existing drug laws] would be considered a specific offense." H.R. Rep. No. 82-635 (1951); S. Rep. No. 82-1051 (1951) (accepting and reproducing House report). Consistent with this express intent, Section 846 appeared in the public laws in a section labeled "*Offenses* and Penalties." Pub. L. No. 91-513, § 406, 84 Stat. 1265 (1970) (emphasis added).[11]

[11] Petitioners' argument is not undercut by references by two members of Congress to Section 846 in proposing earlier conspiracy penalty provisions similar to Section 1956(h). Both Senator Biden, 136 Cong. Rec. S6639 (daily ed. May 21, 1990), and Senator D'Amato, 137 Cong. Rec. S12,235 (daily ed. Aug. 2, 1991), introduced bills that would have amended Section 1956 to add conspiracy provisions substantially similar to the language of Section 1956(h); in introducing these bills, each Senator referred to the statutory penalties for drug conspiracies. Such references should not affect this Court's interpretation of Section 1956(h) for two reasons. First, they were made in relation to bills that were not passed. Second, and even more importantly, Senators Biden and D'Amato referred to drug conspiracy statutes solely as an example

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That the language in Section 1956(h) is similar to the language of 18 U.S.C. 846 is not dispositive. In *Scarborough* v. *United States*, 431 U.S. 563 (1977), this Court noted that Congress's deliberate use of particular verb tenses in one provision of the Omnibus Crime Control Act did not imply that it had used the same tenses just as deliberately in another provision of the Omnibus Act, particularly when the second provision was "enacted hastily with little discussion." *Id.* at 569. Similarly, in this case, *Shabani*'s conclusion that Congress deliberately drafted the language of Section 846 to omit an overt act requirement, 513 U.S. at 14, does not automatically determine the meaning of Section 1956.

Third, it would be a mistake for this Court to assume that Congress's analysis in enacting Section 1956(h) paralleled this Court's analysis in *Shabani*. *Shabani* was decided two years *after* the passage of Section 1956(h), and members of Congress therefore could not be expected to anticipate its reasoning in pre-*Shabani* debates. Nor, prior to *Shabani*, should Congress have been expected to focus on the two decades-old decisions on which this Court relied in *Shabani* – *Singer* v. *United States*, 323 U.S. 338 (1945), and *Nash* v. *United States*, 229 U.S. 373 (1913). The

of using crime-specific conspiracy statutes to increase penalties for particular conspiracies. *See* 136 Cong. Rec. S6639 (daily ed. May 21, 1990) (statement of Sen. Biden) (describing his proposed provision as "a technical amendment to make consistent the penalty for money laundering conspiracies with *penalties for drug conspiracies*, which carry the same penalty as the offense that is the object of the conspiracy" (emphasis added)); 137 Cong. Rec. S12,235 (daily ed. Aug. 2, 1991) (statement of Sen. D'Amato) (describing his proposed provision as "rais[ing] the penalty for money laundering conspiracy from 5 years to whatever the penalty would be for the substantive offense that was the object of the conspiracy").

members of Congress who considered Section 1956(h) mentioned neither of these cases.

Fourth, this Court observed in *Shabani* that the statutory language failed to "require[] that an overt act be committed to further the conspiracy, and we have not inferred such a requirement from congressional silence in other conspiracy statutes." 513 U.S. at 13. By contrast, with respect to money laundering conspiracies, Congress ratified the majority view that an overt act must be proved when it enacted the money laundering venue provision, 18 U.S.C. 1956(i), in 2001. *See infra* Part III.

Finally, *Shabani*'s bright-line formulary cannot mechanically be applied to conspiracy provisions – like Section 1956(h) – that are subsections of carefully constructed statutory offenses. The *Shabani* formulary only takes into consideration discrete, specific conspiracy statutes. It does not speak to a distinct species of conspiracy statutes: those that are subsections of other specific offenses. Title 18 alone has fifty-nine such subsections.[12]

[12] Conspiracy To Destroy Aircraft or Aircraft Facilities, § 32(a)(7); Conspiracy To Commit Violence Against an Aircraft, § 32(b)(4); Conspiracy To Commit Violence at International Airports, § 37(a); Fraud Conspiracy Involving Aircraft or Space Vehicle Parts, § 38(a)(3); Conspiracy To Influence or Impede a Federal Official, § 115(a)(1)(A); Bribery in Sporting Contest Conspiracy, § 224(a); Conspiracy Involving Chemical Weapons, § 229(a)(2); Conspiracy Involving Street Gangs, § 521(c)(3) and (d)(3)(D); Conspiracy Involving Defense Information, § 793(g); Conspiracy Involving Aid to Foreign Government, § 794(c); Conspiracy Involving Nuclear Materials, § 831(a)(8); Conspiracy Involving Explosive Materials, § 844(m) and (n); Conspiracy Involving Extortionate Extensions of Credit, § 892(a); Conspiracy Involving Collections with Extortionate Means, § 894(a); Firearm Conspiracies, § 924(n) and § 930(c); Conspiracy To Kill, Kidnap, or Maim in a Foreign Country, § 956(a)(1) and (b); Conspiracy Involving Fraud and Access

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In determining the meaning of these sections, a court must consider not only the bare meaning of a word like "conspiracy" or "conspires," but also the specific context in which the language is used, and its purpose in the statutory scheme. *See Ratzlaf* v. *United States*, 510 U.S. 135, 141 (1994) (explaining that "willful" is a "word of many meanings" and must be interpreted mindful of the complex of provisions in which it is embedded); *Bailey* v. *United States*, 516 U.S. 137, 145 (1995) (in determining whether

Devices, § 1029(b)(2); Conspiracy Involving Fraud and Electronic Mail, § 1037(a)(5); Conspiracy To Murder, § 1117; Conspiracy To Kidnap, § 1201(c); Conspiracy To Take Hostages, § 1203(a); Conspiracy To Tamper with Consumer Products, § 1365(e); Conspiracy To Harm Law Enforcement Animals, § 1368(a); Conspiracy Involving the Sexual Abuse of Children, § 1466(a) and (b); Conspiracy To Obstruct State or Local Law Enforcement, § 1511(a); Conspiracy Witness Tampering, § 1512(k); Conspiracy Involving Retaliation Against a Witness, § 1513(e); Conspiracy To Kidnap the President or His Staff, § 1751(d); Conspiracy To Enter or Obstruct Offices of the President, § 1752(b); Economic Espionage Conspiracy, § 1831(a)(5); Theft of Trade Secrets Conspiracy, § 1832(a)(5); Racketeering Conspiracy, § 1951(a); Murder for Hire Conspiracy, § 195(a); Violent Crimes in Aid of Racketeering Conspiracy, § 1959(a) and (d); Train Wrecking Conspiracy, § 1992(c); Terrorism on Mass Transit Conspiracy, § 1993(a)(8); Robbery of Controlled Substances Conspiracy, § 2118(d); Destruction of War Material Conspiracy, § 2153; Production of Defective War Material Conspiracy, § 2154(b); Destruction of National Defense Material Conspiracy, § 2155(b); Sexual Exploitation of Children Conspiracy, § 2251(e); Conspiracy Involving Sexual Materials, § 2252(b)(1) and (2); Material Containing Child Pornography Conspiracy, § 2252A(b)(1) and (2); Conspiracy To Commit Violence Against Maritime Navigation, § 2280(a)(1)(h); Conspiracy To Commit Violence Against Maritime Fixed Platforms, § 2281(a)(1)(F); Conspiracy To Commit Homicide, § 2332(b); Conspiracy To Commit Acts of Terrorism, § 2332b(a)(2); Conspiracy To Bomb Public Places, § 2332(f)(a)(2); Conspiracy To Provide Material Support to Terrorist, § 2339B(a)(1); Conspiracy To Finance Terrorism, § 2339C(a)(2); Conspiracy To Commit Torture, § 2340A(c); Conspiracies Affecting Armed Forces, § 2388(b); and Conspiracy Involving the Transportation of Minors, § 2423(e).

petitioner "used" a firearm, it was necessary to consider not only the "bare meaning" of the word "use," but also its "placement and purpose in the statutory scheme"); *Holloway* v. *United States*, 526 U.S. 1, 6 (1999) (similar analysis with respect to the words "with the intent to cause death or serious bodily harm").

For example, some conspiracy statutes, like Section 1956(h), were clearly passed not to change the elements of a conspiracy, but to increase the available penalties. The Conference Report accompanying the Anti-Terrorism and Effective Death Penalty Act of 1996 explained that the Act had created nine new conspiracy offenses[13] for this purpose:

> Adding the conspiracy language to these criminal statutes will enable the Government to prosecute and punish those offenses appropriately. Without a conspiracy element in the statutory language, the Government must rely on title 18, United States Code, section 371, to prosecute conspiracies generally. Section 371 only carries a five year statutory maximum penalty, even if the underlying offense requires a much higher penalty. This section corrects this anomaly.

[13] AEDPA created new conspiracy offenses related to the following substantive crimes: 18 U.S.C. 32 (destruction of aircraft); 18 U.S.C. 37 (violence at airports serving international civil aviation); 18 U.S.C. 115 (violent crimes against former federal officials and family members of current or former federal officials); 18 U.S.C. 175 (prohibitions with respect to biological weapons); 18 U.S.C. 844 (use of explosives); 18 U.S.C. 956 (harming people overseas); 18 U.S.C. 1203 (hostage taking); 18 U.S.C. 2280 (violence against maritime navigation); and 18 U.S.C. 2281 (violence against maritime fixed platforms).

H.R. Rep. 104-383, at 86 (1995). In contrast, there are other sections that carry penalties less severe than a Section 371 conspiracy. *See, e.g.*, 18 U.S.C. 1368(a) (imposing a one-year statutory maximum for harming animals used in law enforcement).

Given the differing language, structure and histories of conspiracy enactments, *Shabani*'s bright-line formulary – convenient as it might be – cannot create a mechanical rule applicable to all statutes.

Nor does this Court's decision in *Salinas* v. *United States*, 522 U.S. 52 (1997), compel the conclusion that Section 1956(h) somehow abandoned the pre-existing overt act requirement. *Salinas* construed the RICO conspiracy provision, 18 U.S.C. 1962(d), to not require proof of an overt act. First, unlike the money laundering statute, the RICO conspiracy provision is set out as one of the four "prohibited activities" in 18 U.S.C. 1962(d) that define – rather than merely punish – RICO offenses, and is not mixed in with the RICO provisions for civil remedies or venue as is the case with Section 1956(h). Second, in *Salinas*, this Court presumed that Congress intended the phrase "to conspire" to have its conventional, common-law meaning, but of course at most, this canon of construction only creates a presumption – a presumption that is clearly undercut by the evidence here of the background assumptions, purpose, and statutory structure of the money laundering conspiracy provision. Like the drug conspiracy statute at issue in *Shabani*, the RICO conspiracy statute was clearly intended to create a substantive offense, rather than simply to change the penalties for a pre-existing conspiracy offense.

III. CONGRESS MANIFESTED ITS INTENT TO REQUIRE PROOF OF AN OVERT ACT IN MONEY LAUNDERING CONSPIRACY PROSECUTIONS WHEN IT ENACTED THE MONEY LAUNDERING VENUE PROVISION, 18 U.S.C. 1956(i).

Congress's enactment of a new venue provision for money laundering cases, 18 U.S.C. 1956(i), reinforces the conclusion that Section 1956(h) requires proof of an overt act. Congress passed Section 1956(i) in 2001, Pub. L. No. 107-56, § 1004, 115 Stat. 392, in response to *United States* v. *Cabrales*, 524 U.S. 1, 6 (1998), in which this Court held that Missouri was not the proper venue for Cabrales's prosecution for money laundering offenses, even though the underlying illegal activity that generated the funds occurred in Missouri, when all of the proscribed financial transactions took place in Florida. *Id.* at 6. In the aftermath of *Cabrales*, legislation was introduced in both houses of Congress to adopt this Court's suggestion, *id.* at 8, that venue might be proper in the district where the specified unlawful activity occurred, if the defendant transported or played a role in the transfer of the money from that district to the district where the funds were to be laundered. *See* The Money Laundering Deterrence Act of 1998, H.R. 4005, 105th Cong.; The Laundering Enforcement and Combating Drugs in Prisons Act of 1998, S. 2011, 105th Cong.; The 21st Century Law Enforcement, Crime Prevention and Victims Assistance Act, S. 16, 107th Cong. (2001).

Congress subsequently enacted a money laundering venue provision as part of the USA PATRIOT Act.[14] Codified at 18 U.S.C. 1956(i), it provides:

> (1) Except as provided in paragraph (2), a prosecution for an offense under this section or section 1957 may be brought in –
>
> (A) any district in which the financial or monetary transaction was conducted; or
>
> (B) any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted.
>
> (2) A prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought in the district where venue would lie for the completed offense under paragraph (1), or in any other district where an act in furtherance of the attempt or conspiracy took place.
>
> (3) For purposes of this section, a transfer of funds from 1 place to another, by wire, or any other means, shall constitute a single, continuing transaction. Any person who conducts (as that term is defined in subsection (c)(2)) any portion of the transaction may be charged in any district in which the transaction takes place.

[14] Pub. L. No. 107-56, 115 Stat. 308, 392 (Oct. 26, 2001).

When this venue subsection was enacted, the overwhelming majority of the courts of appeals that had considered the question had interpreted Section 1956(h) to require proof of an overt act. *See, e.g.*, *United States* v. *Navarro*, 145 F.3d 580, 593 (CA3 1993); *United States* v. *Conley*, 37 F.3d 970 (CA3 1994); *United States* v. *Wilson*, 249 F.3d 366, 379 (CA5 2001); *United States* v. *Pettigrew*, 77 F.3d 1500, 1519 (CA5 1996); *United States* v. *Ross*, 190 F.3d 446, 450 (CA6), cert. denied, 528 U.S. 1033 (1999); *United States* v. *Lee*, 991 F.2d 343, 348 (CA6 1993); *United States* v. *Emerson*, 128 F.3d 557, 561 (CA7 1997) (citing *United States* v. *Rodriguez*, 53 F.3d 1439, 1444 (CA7 1995)); *United States* v. *Hildebrand*, 152 F.3d 756, 762 (CA8), cert. denied, 525 U.S. 1033 (1998); *United States* v. *Evans*, 272 F.3d 1069, 1082 (CA8 2001), cert. denied, 535 U.S. 1029 (2002). The lone exception was apparently the Ninth Circuit, *see United States* v. *Tam*, 240 F.3d 797 (CA9 2001). Far from taking the opportunity to disapprove this majority rule, by amending Section 1956(h) or otherwise,[15] Congress instead implicitly relied on the majority view that money laundering conspiracies require proof of an

[15] Between the passage of the Annunzio-Wylie Act in 1992 and the USA PATRIOT Act in 2001, Congress enacted several other changes relating to the money laundering laws. Pub. L. No. 103-325, 108 Stat. 2243 (1994), made clerical corrections to Sections 1956 and 1957; Pub. L. No. 104-132, 110 Stat. 1301 (1996), added terrorism offenses to the list of specified unlawful activities; Pub. L. No. 104-191, 110 Stat. 2018 (1996), added health-care offenses to the list of specified unlawful activities; Pub. L. No. 104-294, 110 Stat. 3499 (1996), made clerical corrections to Section 1956; and Pub. L. No. 106-569, 114 Stat. 3018 (2000), added to the category of specified unlawful activities covered by the money laundering laws any violation of Section 543(a)(1) of the Housing Act of 1949 related to "equity skimming." Congress had the opportunity to amend Section 1956(h) to expressly do away with the overt act requirement on these occasions as well but declined to do so.

overt act by incorporating the overt act element into the venue provision. Under Section 1956(i)(2), conspiracy offenses may be prosecuted where either (1) the completed money laundering offense could be prosecuted, or (2) "*where an act in furtherance of the conspiracy took place*," precisely the language that is used to refer to overt acts. By using language in the venue provision that presupposes the commission of an overt act, Congress reaffirmed its intent to retain the overt act requirement in money laundering conspiracy prosecutions. Otherwise, if Congress thought it had already eliminated the overt act requirement, then, as it has done in numerous other statutes, it would have simply authorized a money laundering prosecution in the district where the proscribed activity occurred, *i.e.*, where the unlawful agreement was reached. *Cf.* 18 U.S.C. 1512(i) (venue for tampering with a witness may lie "in the district *in which the conduct constituting the alleged offense occurred*") (emphasis added); 18 U.S.C. 1752(c) (venue for prosecutions for conspiracy to obstruct or impede temporary presidential residences and offices lies in "*the place where the offense occurred*") (emphasis added); 18 U.S.C. 3235 (venue in capital cases lie "*where the offense was committed*") (emphasis added).

If in enacting Section 1956(h) Congress intended to eliminate the overt act requirement from money laundering conspiracies, it would not have made an about-face almost ten years later by re-imposing that requirement for venue purposes. Congress's failure to explicitly disapprove the long-standing majority rule requiring an overt act in a prosecution for a money laundering conspiracy under Section 1956(h) is telling: "[P]rolonged congressional silence in response to a settled interpretation of a federal

statute provides powerful support for maintaining the status quo. * * * In a contest between the dictionary and the doctrine of stare decisis, the latter clearly wins." *Hibbs* v. *Winn*, 124 S. Ct. 2276, 2292 (2004) (Stevens, J., concurring). Similarly, "Congress is unlikely to intend any radical departures from past practice without making a point of saying so." *Jones* v. *United States*, 526 U.S. 227, 234 (1999); *see also Taylor* v. *United States*, 495 U.S. 575, 590 (1990) (even the deletion of a pre-existing definition from a new version of the burglary statute was insufficient evidence of Congress's intent to repeal that definition of burglary, where there was nothing in the legislative history to show that was Congress's intent).

IV. REQUIRING AN OVERT ACT FOR MONEY LAUNDERING CONSPIRACY PROSECUTIONS SERVES IMPORTANT GOALS WHILE NOT INHIBITING MERITORIOUS PROSECUTIONS.

The distinctive nature of money-laundering-related offenses provides an important policy reason for requiring proof of an overt act in money laundering conspiracy prosecutions. Put simply, a contrary result gives prosecutors a tool for rewriting the penalty structure of the federal criminal code by permitting them to treat a wide range of offenses as crimes with a twenty-year maximum sentence regardless of Congress's expressed intent.

Money laundering is a derivative crime: The acts of depositing, withdrawing, and transferring funds are inherently innocuous. What makes money laundering a crime is the *source* of the funds. Only once some underlying criminal activity has taken place and generated economic proceeds are there funds to launder. Money laundering conspiracy is thus a doubly derivative crime: It

involves an agreement to launder funds once a specified unlawful activity has generated those funds. Notably, the specified unlawful activities listed in Section 1956(c)(7) encompass a staggeringly wide range of criminal behavior. Some of the specified activities are extremely serious *malum in se* crimes – for example, using a weapon of mass destruction to kill people (a capital crime under 18 U.S.C. 2332a(a)(3)). Others are entirely regulatory: for example, concealing from the Farmers Home Administration the sale of crops and livestock in which the FmHA holds a security interest (a crime under 18 U.S.C. 658 with a maximum sentence of five years and, with respect to property with a value of less than $1000, a maximum sentence of one year). Given the ever-expanding list of specified unlawful activities in Section 1956(c)(7), it seems accurate to say that a high proportion of economically motivated crimes qualifies for potential prosecution under Sections 1956 and 1957.

Three things are true of the list of specified unlawful activities. First, many of these substantive offenses carry maximum punishments of well under twenty years. *See, e.g.*, 18 U.S.C. 152 (five-year maximum for certain concealments of assets and false statements); 18 U.S.C. 541 (two-year maximum for failing to pay the proper duty on goods coming into the country); 18 U.S.C. 669 (ten-year maximum for embezzling or stealing the funds of a health-care benefit program); 18 U.S.C. 875(d) (two-year maximum for transmitting, with intent to extort, a threat to injure the reputation of a dead person). Second, many of the specified unlawful activities rely on Section 371 for conspiracy prosecutions; as petitioners have already explained, Section 371 both requires proof of an overt act and provides for a maximum penalty of five years. Third,

in a high proportion of situations involving Section 1956(c)(7) specified unlawful activities, if the activity involves more than one actor and the activity succeeds, *someone* will engage in a transaction prohibited by Section 1956 or 1957.

Permitting prosecution for conspiracy to launder money without proof of any overt act permits prosecutors to circumvent two limits that Congress has placed on punishments for various underlying offenses. First, it allows prosecutors to ratchet up dramatically the potential punishment defendants face: Instead of facing a five-year sentence for both the substantive crime and the conspiracy to commit the substantive crime, a defendant who agrees to engage in post-crime financial transactions that fit within Section 1956 faces a twenty-year sentence for the conspiracy alone. This huge potential disparity may face defendants with an almost irresistible pressure to plead guilty. Second, it allows prosecutors to circumvent the overt act requirement of Section 371 by charging money laundering conspiracy in place of (or in addition to) conspiracy to commit the underlying offense.

To be sure, the ratchet would operate even in the presence of an overt act requirement. But at least the overt act requirement would ensure that defendants face draconian punishments only when the finder of fact is sure of their "clear resolve and intent to commit the crime." Paul Marcus, Prosecution and Defense of Criminal Conspiracy Cases § 2.08(3) (1987). That assurance lies beneath the fact that the "great majority" of states have long

required proof of an overt act for any conspiracy, including money laundering conspiracies.[16]

The Government's position, by contrast, creates the possibility that a jury might acquit the defendants of committing the underlying specified illegal activity (for example, because it concludes that the defendants did not in fact conceal the proceeds from selling a cow pledged as security for an FmHA loan); acquit the defendants of conspiracy to commit the underlying specified act (because, for example, it concluded that the defendants never took any step to further their plan to sell the cow); and acquit the defendants of laundering money (because, the illegal sale never having occurred, no funds were generated); but nonetheless convict the defendants of *conspiracy* to launder money because the defendants agreed to sell the cow, conceal the proceeds, and put the concealed proceeds in the bank. That "crime" seems far too inchoate to justify prosecution in a case where the defendants took no action whatsoever with respect to the Section 1956(c)(7) specified activity. And it seems absurd to authorize a twenty-year sentence when there is no real proof of their intention in fact to follow through on their agreement. To be sure, Congress could authorize such a result, but,

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[16] *See* 2 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 12.2(b) n.[illegible] (2d ed. 2003) (listing state statutes); *cf. Taylor*, 495 U.S. at 598 ("Only a few States retain the common-law definition, or something closely resembling it."). Even states that exempt certain conspiracies from the overt act requirement nevertheless retain the requirement for money laundering conspiracies. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-1003(A) (West 1978) (exempting only felony upon a person, arson, and burglary); Utah Code Ann. § 76-4-201 (1974) (exempting only capital offenses, felony against a person, arson, burglary, and robbery).

absent some clearly expressed intention, this Court should not presume that it did.

Particularly with respect to such a potentially sweeping statute, this Court should not rely on "prosecutorial discretion" to ensure that a statute does not ensnare those beyond its proper confines. *See Baggett* v. *Bullitt*, 377 U.S. 360, 373 (1964) ("It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful * * * prosecution for some of the activities seemingly embraced within the sweeping statutory definitions."). Results such as this are more properly avoided by construing Section 1956(h) to retain an overt act requirement.

At the same time, there is no evidence that legitimate prosecutions have in any way been stymied by the overt act requirement. On the contrary, the overt act requirement is easily satisfied in every legitimate prosecution because "if the agreement has been established but the object has not been attained, virtually any act will satisfy the overt act requirement." 2 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 12.2(b) (2d ed. 2003), cited in *United States* v. *O'Brien*, 972 F.2d 47, 52 (CA3 1992). An overt act requirement "has seldom materially increased the difficulty of securing convictions for conspiracy." *Developments in the Law of Criminal Conspiracy*, 72 Harv. L. Rev. 922, 946 (1959). In those jurisdictions that have required proof of an overt act for convictions under Section 1956(h), the courts have regularly rejected challenges to the sufficiency of the evidence to establish an overt act when an overt act was alleged and proved. *See, e.g.*, *United States* v. *Evans*, 272 F.3d 1069, 1082-83 (CA8 2001); *United States* v. *Godwin*, 272 F.3d 659, 669 (CA4 2001); *United States* v. *Ross*, 190 F.3d

446, 450-51 (CA6 1999); *United States* v. *Hildebrand*, 152 F.3d 756, 762 (CA8 1998); *United States* v. *Emerson*, 128 F.3d 557, 561-62 (CA7 1997).

Considering both the important purpose served by the overt act requirement and the lack of any evidence that this requirement inhibits legitimate law enforcement, the majority interpretation of Section 1956(h) is correct and should not be disturbed.

V. ANY AMBIGUITY IN SECTION 1956(h) SHOULD TRIGGER THE RULE OF LENITY AND INCORPORATE THE COMMISSION OF AN OVERT ACT AS AN ESSENTIAL ELEMENT IN A PROSECUTION FOR CONSPIRACY TO COMMIT MONEY LAUNDERING.

To be sure, viewed out of context and in a vacuum, "conspires" could support a common-law definition of conspiracy, not requiring the commission of an overt act in furtherance of the conspiracy's objective. But money laundering conspiracies did not exist at common law. *See United States* v. *Wells*, 519 U.S. 482, 491 (1997) ("We do, of course, presume that Congress incorporates the common-law meaning of the terms it uses *if* those terms * * * have accumulated settled meaning under * * * the common law.") (emphasis supplied, internal quotation marks omitted). Certainly Congress's silence about the overt act requirement in Section 1956(h) should not be interpreted as an implicit decision to reinstate the common-law definition of conspiracy when it applies to money laundering, particularly in light of the fact that the lower courts had been adjudicating money laundering prosecutions under Section 371, which clearly does have an overt act requirement. This Court has made clear that the common

law does not automatically determine a statute's meaning. *Id.* at 491 n.10 (1997) ("[W]e disagree with our colleague's apparent view that any term that is an element of a common-law crime carries with it every other aspect of that common-law crime when the term is used in a statute * * * [O]ur rule on imputing common-law meaning to statutory terms does not sweep so broadly."). Here, there is simply no indication in the legislative history that Congress even considered reinstating the substantive elements of the common-law definition of conspiracy. Furthermore, in *Taylor* this Court rejected the common-law definition of "burglary" in favor of the well-established pre-existing definition, even though that definition had actually been deleted from the statute at issue. 495 U.S. at 592-93. Similarly, Congress's silence here should not be interpreted as resurrecting the common-law definition of conspiracy when that definition has had no role in the money laundering arena, whether in federal or state courts.[17] *Cf. Taylor*, 495 U.S. at 598 ("Only a few States retain the common-law definition, or something closely resembling it."); *Perrin v. United States*, 444 U.S. 37, 45 (1979) ("[B]y 1961 the common understanding and meaning of 'bribery' had extended beyond its early common-law definitions.").

In contrast to the government's common-law gloss on Section 1956(h), an equally plausible and arguably more compelling interpretation requires the commission of an overt act, considering the statutory scheme and unequivocal legislative history. Money laundering is a construct of the twentieth century, and a conspiracy to commit money laundering is a statutory offense. Like the general statutory

[17] *See supra* note 16.

offense for conspiracy, 18 U.S.C. 371, a money laundering conspiracy should require proof of an overt act. Herein lies the ambiguity, and thus the need for the Rule of Lenity.

This Court has consistently recognized that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Liparota* v. *United States*, 471 U.S. 419, 427 (1985) (quoting *Rewis* v. *United States*, 401 U.S. 808, 812 (1971)). In *United States* v. *Granderson*, 511 U.S. 39 (1994), at issue was the meaning of the term "original sentence" in 18 U.S.C. 3565. Since the phrase was not defined or modified in any way, and its plain meaning would lead to an absurd sentencing result, the Court turned to the statute's purpose and legislative history before concluding that "where the text, structure, and statutory history fail to establish that the Government's position is *unambiguously* correct, the rule of lenity operates to resolve the statutory ambiguity in Granderson's favor." *Id.* at 54 (emphasis added). Here, the rule of lenity must operate to resolve any statutory ambiguity in petitioners' favor and require the commission of an overt act in money laundering conspiracy prosecutions.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit should be reversed.

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DAVID WHITFIELD, PETITIONER

v.

UNITED STATES OF AMERICA

HAYWOOD EUDON HALL, AKA DON HALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a conviction for conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h), requires proof of an overt act in furtherance of the conspiracy.

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In the Supreme Court of the United States

No. 03-1293

DAVID WHITFIELD, PETITIONER

v.

UNITED STATES OF AMERICA

No. 03-1294

HAYWOOD EUDON HALL, AKA DON HALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a)[1] is reported at 349 F.3d 1320.

JURISDICTION

The judgments of the court of appeals were entered on November 10, 2003. On January 14, 2004, Justice Kennedy extended petitioner Whitfield's time within which to file a petition for a writ of certiorari to and including March 8, 2004, and the petition was filed on March 5, 2004. On February 5, 2004, Justice Kennedy

[1] "Pet. App." refers to the appendix to the petition in No. 03-1294.

extended petitioner Hall's time within which to file a petition for a writ of certiorari to and including March 10, 2003, and the petition was filed on that date. The petitions for writs of certiorari were granted on June 21, 2004. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 1956(h) of Title 18 of the United States Code provides as follows:

> Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

2. Section 1956(i) of Title 18 of the United States Code (Supp. I 2001) provides, in part, as follows:

> Venue.—(1) Except as provided in paragraph (2), a prosecution for an offense under this section or section 1957 may be brought in—
>
> (A) any district in which the financial or monetary transaction is conducted; or
>
> (B) any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted.
>
> (2) A prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought in the district where venue would lie for the completed offense under paragraph (1), or in any other district where an act in furtherance of the attempt or conspiracy took place.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioners Whitfield and Hall were convicted of conspiracy to commit mail fraud, wire fraud, and interstate transportation of property taken by fraud, in violation of 18 U.S.C. 371, and conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h). Whitfield was also convicted on four counts of mail fraud, in violation of 18 U.S.C. 1341; five counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i); and five counts of unlawful monetary transactions, in violation of 18 U.S.C. 1957. Hall was also convicted on three counts of mail fraud, in violation of 18 U.S.C. 1341. Whitfield was sentenced to 235 months of imprisonment, and Hall was sentenced to 185 months of imprisonment, each to be followed by three years of supervised release. Whitfield Pet. App. 9a-10a; Pet. App. 15a-17a. Petitioners were also ordered to pay $85,030,412 in restitution. J.A. 33. The court of appeals affirmed the convictions, rejecting the contention that proof of an overt act is an element of money laundering conspiracy.[2] Pet. App. 1a-11a.

1. On March 10, 1999, a federal grand jury in the Middle District of Florida returned a 20-count indictment against petitioners and five others. As relevant here, petitioners were charged in count one of the indictment with conspiracy to commit mail fraud, wire

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[2] The court of appeals remanded Hall's case for resentencing because the district court had erroneously enhanced his sentence under the Sentencing Guidelines. The district court subsequently sentenced Hall to 137 months of imprisonment.

fraud, and interstate transportation of goods and money taken by fraud, in violation of 18 U.S.C. 371. That count described the scheme in the "manner and means" section and alleged, as part of the scheme, that petitioners conducted financial transactions involving the proceeds of their mail fraud scheme. J.A. 6. Count one also listed 20 overt acts. Many of the overt acts pertained to petitioners' money laundering activities. J.A. 6-9. Count two of the indictment charged petitioners with conspiracy to launder money, in violation of 18 U.S.C. 1956(h), and incorporated the "manner and means" section of count one. Count two did not allege that the conspirators had committed any overt act in furtherance of the money laundering conspiracy. J.A. 1-10.

2. The evidence at petitioners' trial showed that petitioners were members of the executive board of the Greater Ministries International Church (GMIC). GMIC ran a "gifting" program that took in more than $400 million between 1996 and 1999. Under that program, investors would "gift" money to GMIC; in exchange, the investors were promised a return that doubled their contribution. Petitioners touted the program in presentations throughout the country. They explained that profits were generated through investments in gold and diamond mining, offshore commodities, and overseas banks that paid high interest rates, and that profits also were used for philanthropic purposes. Pet. App. 3a; Gov't C.A. Br. 6-9, 15.

Most of those claims were false. GMIC had no assets, and many investors received little or no return on their gifts. Virtually none of the money was donated to charity. Instead, petitioners and their co-conspirators received commissions on money that they solicited. Petitioner Hall received more than $539,000, and petitioner Whitfield received more than $678,000, all in cash. During the course of the scheme, the conspirators deposited personal checks from investors made payable to GMIC and exchanged them for cash. Pet. App. 4a-5a; Gov't C.A. Br. 13-15.

3. At the close of the evidence, petitioners asked the district court to instruct the jury that the government was required to prove beyond a reasonable doubt that an overt act in furtherance of the money laundering conspiracy had been committed. The district court declined to give that instruction.[3] J.A. 19-21.

4. The court of appeals affirmed petitioners' convictions. Pet. App. 1a-11a. It held that the district court had correctly instructed the jury on the elements of 18 U.S.C. 1956(h), because the statute does not require proof of an overt act. The court of appeals faulted decisions finding otherwise because those decisions relied on case law interpreting the general conspiracy statute, 18 U.S.C. 371, which "expressly requires proof of an overt act." Pet. App. 6a. It reasoned that Section 1956(h) "is not like § 371, but instead is nearly identical" to the drug conspiracy statute, 21 U.S.C. 846, whose language "does not call for an overt act." Pet. App. 6a. Observing that this Court "refused to infer an overt act

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[3] The district court's instruction to the jury on the elements of 18 U.S.C. 1956(h) was as follows:

> In order for you to find any defendant guilty of this crime, you must be convinced that the Government has proven each of the following elements beyond a reasonable doubt: First, that two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment; and second, that the defendant under consideration knowingly and willfully became a member of such conspiracy.

J.A. 22-23.

requirement into the [drug conspiracy] statute" in *United States* v. *Shabani*, 513 U.S. 10, 13 (1994), Pet. App. 6a, the court of appeals concluded that *Shabani* "compelled" the conclusion that Section 1956(h) does not require proof of an overt act, *id.* at 7a.

SUMMARY OF ARGUMENT

The court of appeals correctly held that proof of an overt act is not required in order to establish the crime of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h). Section 1956(h) provides that "[a]ny person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy." 18 U.S.C. 1956(h). The text of Section 1956(h) does not identify an overt act, or conduct in furtherance of the conspiracy, as an element of the offense. Nor can an overt act requirement be implied. It is well settled that an overt act was not an element of conspiracy at common law. When Congress employs a common law term, it is presumed, absent contrary evidence, to adopt the common law meaning of that term. There is no evidence that Congress intended the term "conspires" to carry anything other than its common law meaning. Congress has enacted numerous conspiracy statutes, including 18 U.S.C. 371, that expressly contain an overt act requirement, while enacting others, such as the Sherman Act, 15 U.S.C. 1, that do not. Congress's practice confirms that it uses the term "conspires" in its common law sense, *i.e.*, with no overt act requirement; otherwise, the explicit overt act requirements in the other conspiracy statutes would be superfluous.

A line of this Court's cases interpreting the elements of conspiracy statutes over the last century dictates the conclusion that proof of an overt act is not required

under Section 1956(h). In *United States* v. *Shabani*, 513 U.S. 10 (1994), this Court held that the drug conspiracy statute—which, like Section 1956(h), contains no explicit overt act requirement—does not require proof of an overt act. Citing *Nash* v. *United States*, 229 U.S. 373 (1913) (Holmes, J.), and *Singer* v. *United States*, 323 U.S. 338 (1945), the Court explained that its prior cases interpreting conspiracy statutes "give Congress a formulary: by choosing a text modeled on § 371, it gets an overt act requirement; by choosing a text modeled on the Sherman Act, 15 U.S.C. § 1, it dispenses with such a requirement." 513 U.S. at 14 (internal quotation marks omitted). By choosing a text modeled on the Sherman Act and the drug conspiracy statute, Congress dispensed with the overt act requirement for money laundering conspiracies.

Petitioners seek to avoid application of the textual formulary explained in *Shabani* by resorting to Section 1956(h)'s legislative history. Their reliance on that legislative history is unavailing, however, because even if this Court ventures beyond the unambiguous text—which it should not—that history does not support their position. That history demonstrates that Congress modeled Section 1956(h) on the drug conspiracy statute construed in *Shabani*. Nor are petitioners helped by the observation that Congress enacted Section 1956(h) for the purpose of increasing the penalties for money laundering conspiracies that previously were prosecuted under Section 371. Congress's intent to punish money laundering conspiracies more severely than before—which it accomplished without regard to whether Section 1956(h) includes an overt act requirement—does not undercut the necessary inference that Congress's omission of an overt act requirement from the text of the new statute was purposeful. Indeed,

Shabani rejected the argument that a conspiracy statute should be read to include an overt act requirement unless Congress explicitly states its intention to omit it.

Petitioners' reliance on 18 U.S.C. 1956(i) (Supp. I 2001), a venue provision for money laundering cases enacted as part of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 1004, 115 Stat. 392 (USA PATRIOT Act), is also misplaced. Among other things, Section 1956(i) codified the longstanding rule that venue for conspiracies may lie in any district where an overt act was committed. But Section 1956(i) does not *require* proof of an overt act to establish venue in every case. And, more importantly, Section 1956(i) is consistent with the widely applied rule that venue in a conspiracy case lies wherever an overt act was committed, even where the underlying conspiracy statute does *not* require proof of an overt act to establish the offense. Section 1956(i)'s bases for establishing venue therefore say nothing about the elements of the money laundering conspiracy offense.

Petitioners additionally press the policy argument that an overt act requirement would serve as an important check on prosecutors. Given that Congress plainly omitted an overt act requirement from Section 1956(h), such policy arguments must be addressed to Congress. Petitioners' invocation of the rule of lenity is equally misplaced, because it applies only to ambiguous statutes.

ARGUMENT

THE MONEY LAUNDERING CONSPIRACY STATUTE, 18 U.S.C. 1956(h), DOES NOT REQUIRE PROOF OF AN OVERT ACT

The court of appeals correctly held that the money laundering conspiracy statute, 18 U.S.C. 1956(h), does not require proof of an overt act in furtherance of the conspiracy. The text of the statute does not define the offense to include an overt act or its equivalent, and this Court has made clear that a criminal conspiracy statute whose text does not contain an overt act requirement should not be read to require proof of an overt act.

A. The Text of 18 U.S.C. 1956(h) Makes Clear That Proof Of An Overt Act Is Not Required

There is no textual support for the contention of petitioners (Br. 10-33) and amicus National Association of Criminal Defense Lawyers (NACDL) (Br. 7-9) that the money laundering conspiracy statute, 18 U.S.C. 1956(h), requires proof of an overt act. Section 1956(h) provides: "Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy."

The text of the statute does not contain an overt act requirement.[4] Rather, it subjects to criminal liability

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[4] Congress has used different language when providing for an overt act requirement in conspiracy statutes. It either uses the term "overt act" or language that describes an overt act, *i.e.*, conduct or an act in furtherance of the conspiracy. Compare, *e.g.*, 18 U.S.C. 1029(b)(2) ("Whoever is a party to a conspiracy of two or more persons to commit an offense under subsection (a) of this section, if any of the parties *engages in any conduct in furtherance of such offense*, shall be fined.") (emphasis added), with 18 U.S.C.

anyone "who conspires to commit" a money laundering crime set out in Section 1956 or Section 1957. Petitioners must therefore locate an overt act in the word "conspires," but they cannot do so in light of the common law and this Court's cases.

First, at common law, proof of an overt act was not required to establish a conspiracy. As this Court explained in *Shabani*, "the common law understanding of conspiracy 'does not make the doing of any act other than the act of conspiring a condition of liability.'" 513 U.S. at 13-14 (quoting *Nash*, 229 U.S. at 378); see *Bannon* v. *United States*, 156 U.S. 464, 468 (1895) ("At common law it was neither necessary to aver nor prove an overt act in furtherance of the conspiracy.").

Second, under the "settled principle of statutory construction," *Shabani*, 513 U.S. at 13, it must be presumed, in the absence of contrary evidence, that Congress intended to adopt the common law understanding of conspiracy when it used the term "conspires" in Section 1956(h). *Ibid.*; see *Neder* v. *United States*, 527 U.S. 1, 21-22 (1999); *United States* v. *Turley*, 352 U.S. 407, 411 (1957) ("[W]here a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning."). That presumption is corroborated by the fact that Congress has expressly included an overt act requirement in many other conspiracy statutes.

1201(c) ("If two or more persons conspire to violate this section and one or more of such persons *do any overt act to effect the object of the conspiracy*, each shall be punished.") (emphasis added). Congress did not include either of those formulations in Section 1956(h).

For example, the general conspiracy statute provides in pertinent part:

> If two or more persons conspire * * * to commit any offense against the United States, * * * and *one or more of such persons do any act to effect the object of the conspiracy*, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. 371 (emphasis added).[5] At least 22 other current criminal conspiracy statutes likewise expressly require proof of an overt act.[6] The inclusion of an

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[5] Congress first enacted a general conspiracy statute in 1867. Act of Mar. 2, 1867, ch. 169, § 30, 14 Stat. 484; see *Hyde* v. *United States*, 225 U.S. 347, 361 (1912); *Developments in the Law-Criminal Conspiracy*, 72 Harv. L. Rev. 920, 946 n.176 (1959). The general conspiracy statute was later codified as Section 5440 of the Revised Statutes (1873-1874) and then as Section 37 of the Criminal Code of 1909. Act of Mar. 4, 1909, ch. 321, § 37, 35 Stat. 1096. After further recodification, see 18 U.S.C. 88 (1925); 18 U.S.C. 371 (Supp. II 1948), it emerged in its current version as 18 U.S.C. 371.

[6] See 18 U.S.C. 351(d) (conspiracy to kill or kidnap certain government officials), 793(g) (conspiracy to violate laws on national defense information), 831(a)(8) (conspiracy to engage in prohibited transactions involving nuclear materials), 956(a) (conspiracy to injure property of foreign government), 1029(b)(2) (conspiracy to commit credit card fraud), 1117 (conspiracy to murder certain government and foreign officials), 1201(c) (conspiracy to kidnap), 1365(e) (conspiracy to tamper with consumer products), 1511(a)(1) (conspiracy to obstruct enforcement of criminal laws to facilitate illegal gambling), 1751(d) (conspiracy to kill or kidnap President and other Executive Branch officials), 1831(a)(5) (conspiracy to commit economic espionage), 1832(a)(5) (conspiracy to steal trade secrets), 2118(d) (conspiracy to commit certain drug robberies), 2153(b) (conspiracy to obstruct national defense activities), 2154(b) (conspiracy to produce defective war materials), 2155(b) (conspiracy to destroy national defense materials), 2156(b) (conspiracy to produce defective national defense material), 2332(b) (conspiracy

express overt act requirement in so many statutes indicates that when Congress intends to require proof of an overt act, it expressly includes such a requirement in the text of the statute. It thus follows that when Congress uses the unadorned term "conspire" in a criminal statute, as it did in Section 1956(h), it intends for that word to carry its common law meaning. Otherwise, the express overt act requirement in numerous conspiracy statutes would be superfluous.

This Court has consistently held that Congress has perpetuated the common law definition of conspiracy in its criminal statutes. See *Salinas* v. *United States*, 522 U.S. 52, 63 (1997) (refusing to read an overt act requirement into 18 U.S.C. 1962(d), which makes it unlawful to "conspire" to commit RICO offense); *Shabani*, 513 U.S. at 13-14 (same with respect to 21 U.S.C. 846, which makes it unlawful to "conspire[] to commit" specified drug offenses); *Singer*, 323 U.S. at 340 (same with respect to Selective Training and Service Act of 1940, ch. 720, § 11, 54 Stat. 894, which prohibited, *inter alia*, "conspir[ing] to" evade registration or service in the land or naval forces); *Nash*, 229 U.S. at 378 (same with respect to Sherman Act because that law "punishes the conspiracies at which it is aimed on the common-law footing,—that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability"). Congress's omission of an overt act

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to kill United States national outside the United States), 2388(b) (conspiracy to convey false information in order to interfere with war effort or cause insubordination in military); 42 U.S.C. 1761(o)(3) (conspiracy to defraud United States in connection with summer food service program for children in service institutions); 47 U.S.C. 509(a)(5) (conspiracy to commit fraud in connection with radio and television game shows); 49 U.S.C. 46505(e) (Supp. I 2001) (conspiracy to carry a weapon or explosive on an aircraft).

requirement in Section 1956(h)—which, like the conspiracy statutes at issue in *Salinas*, *Shabani*, *Singer*, and *Nash*, identifies the act of conspiring as the only condition of liability—thus provides compelling evidence that it intended to punish money laundering conspiracies "on the common-law footing," *Nash*, 229 U.S. at 378. See Wayne R. LaFave, *Substantive Criminal Law* § 12.2, at 626 (4th ed. 2003) ("On the federal level, an overt act is specifically required by the general conspiracy statute, and thus the absence of such a requirement in subsequently enacted federal conspiracy statutes dealing with specific subjects ha[s] been taken to reflect an intent by Congress to instead follow the common law as to those other provisions.") (footnotes omitted).

B. This Court's Decisions Dictate That, Because 18 U.S.C. 1956(h) Does Not Contain An Express Overt Act Requirement, It Does Not Require Proof Of An Overt Act

The court of appeals was correct in observing that this Court's decision in *Shabani* "compel[s]" the conclusion that Section 1956(h) does not require proof of an overt act. Pet. App. 7a. In *Shabani*, the Court unanimously rejected the argument that courts should read an overt act requirement into the drug conspiracy statute, 21 U.S.C. 846. Section 846 provides that "[a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." The Court observed that, unlike the general conspiracy statute, 18 U.S.C. 371, the text of Section 846 does not contain an overt act requirement. The Court found that textual contrast between the two statutes to be dispositive, because the Court's prior

decisions in *Singer* and *Nash* "give Congress a formulary: by choosing a text modeled on [18 U.S.C.] 371, it gets an overt-act requirement; by choosing a text modeled on the Sherman Act, 15 U.S.C. § 1, it dispenses with such a requirement." 513 U.S. at 14 (internal quotation marks omitted). Because Congress chose to follow the latter model in Section 846, the *Shabani* Court held that "the Government need not prove the commission of any overt acts in furtherance of the conspiracy." *Id.* at 15.[7]

Section 1956(h), like the virtually identically worded drug conspiracy statute, does not mention an overt act requirement. *Shabani*, *Singer*, and *Nash*, and the "formulary" they establish, thus dictate the result in this case.[8]

[7] By the same token, when construing conspiracy statutes that expressly require proof of an overt act, this Court has explained that such express language overcomes the presumption that Congress intends to carry forward the common law rule that proof of an overt act is not required to establish a conspiracy. The Court has said that the first clause of the general conspiracy statute —which, like Section 1956(h), covers a person who "conspire[s] * * * to commit [an] offense"—requires proof of "nothing more than an agreement to engage in the prohibited conduct," *United States* v. *Feola*, 420 U.S. 671, 687 (1975). The Court has construed the second clause of the general conspiracy statute—which requires proof that "one or more of such persons do any act to effect the object of the conspiracy" and which is not found in Section 1956(h)—as importing an overt act requirement into the statute. *Fiswick* v. *United States*, 329 U.S. 211, 216 n.4 (1946). Moreover, the Court has explained that the express inclusion of an overt act requirement in the text is a necessary predicate for requiring proof of an overt act because "[a]t common law it was not necessary to aver or prove an overt act" to establish a conspiracy. *Ibid.*; accord *Hyde* v. *United States*, 225 U.S. 347, 359 (1912); see, *e.g.*, *United States* v. *Rabinowich*, 238 U.S. 78, 86 (1915); *Hyde* v. *Shine*, 199 U.S. 62, 76 (1905).

C. Section 1956(h) Is Not Meaningfully Distinguishable From The Drug Conspiracy Statute

Petitioners' attempt to avoid one hundred years of this Court's precedent interpreting conspiracy statutes similar to Section 1956(h) fails. Neither they nor their amicus offers a sound basis for departing from the bright-line rule this Court applied in *Shabani* and its long line of predecessors.

1. Petitioners first rely (Br. 17-18) on the fact that money laundering conspiracies charged under 18 U.S.C. 371 required proof of an overt act, while drug conspiracies charged under the statutory predecessors to 21 U.S.C. 846 did not. Their reliance is misplaced. *Shabani* did not mention, much less rely on, the fact that the drug conspiracy laws that Section 846 replaced had been construed by some courts not to require an

[8] The Fourth and Ninth Circuits, like the court below, have applied *Shabani* to hold that Section 1956(h) does not require proof of an overt act. See *United States* v. *Bolden*, 325 F.3d 471, 491 (4th Cir. 2003); *United States* v. *Tam*, 240 F.3d 797, 802 (9th Cir. 2001). See also *United States* v. *LaSpina*, 299 F.3d 165, 173 n.2 (2d Cir. 2002) (noting, but not resolving, potential application of *Shabani* to Section 1956(h)); *United States* v. *Threadgill*, 172 F.3d 357, 366 & n.5 (5th Cir. 2001) (same). In contrast, those circuits that have required proof of an overt act have not addressed the effect of *Shabani* on the question whether Section 1956(h) requires proof of an overt act and, replicating the mistake the Ninth Circuit had made under the drug statute, see *Shabani*, 513 U.S. at 15, relied on opinions interpreting 18 U.S.C. 371 or 21 U.S.C. 846 that did not survive *Shabani*. See *United States* v. *Evans*, 272 F.3d 1069, 1082 (8th Cir. 2001), cert. denied, 535 U.S. 1029 (2002); *United States* v. *Ross*, 190 F.3d 446, 450 (6th Cir.), cert. denied, 528 U.S. 1033 (1999); *United States* v. *Navarro*, 145 F.3d 580, 593 (3d Cir. 1998); *United States* v. *Emerson*, 128 F.3d 557, 561 (7th Cir. 1997).

overt act requirement. *Shabani* instead relied on the text of the drug conspiracy statute; it "found instructive," 513 U.S. at 14, the contrast between Section 371's express requirement of an overt act and the drug conspiracy statute's omission of it; and it criticized the Ninth Circuit for relying on the Court's precedents interpreting Section 371 and "ignor[ing] the textual variations between the two provisions," *id.* at 15. Indeed, the fact that "the general conspiracy statute preceded and presumably provided the framework for the more specific drug conspiracy statute," *id.* at 14, the Court reasoned, counseled *against* reading an overt act element into the different language of 21 U.S.C. 846. 513 U.S. at 14; see *Singer*, 323 U.S. at 340-343 (holding that conspiracy provision in Selective Training and Service Act did not require proof of an overt act, notwithstanding that conspiracies to commit non-violent offenses outlawed by the Act were previously brought under Section 37 (35 Stat. 1096) (now 18 U.S.C. 371), which contained an overt act requirement).[9]

[9] Drug conspiracies also were originally prosecuted under 18 U.S.C. 371. See, *e.g.*, *On Lee* v. *United States*, 343 U.S. 747 (1952); *Direct Sales Co.* v. *United States*, 319 U.S. 703 (1943). In 1951, Congress created a drug conspiracy offense outside of Section 371 so that it could be prosecuted separately and punished more severely. See Act of Nov. 2, 1951, ch. 666, § 1, 65 Stat. 767 (codified at 21 U.S.C. 174 (Supp. V 1951)); *United States* v. *Gardner*, 202 F. Supp. 256, 258-259 (N.D. Cal. 1962) (observing that Congress, when it enacted Section 846's precursor, "was concerned primarily with increasing and making more uniform penalties for narcotics violations" and that "[a] construction in favor of a separate offense [from Section 371] also would seem to be more consistent" with that intent). A similar provision proscribing conspiracies to import and traffic in marijuana was enacted in 1956. Act of July 18, 1956, ch. 629, Tit. I, § 106, 70 Stat. 570 (codified at 21 U.S.C. 176a (Supp. IV 1957)). Those provisions did not mention an overt act requirement, and courts interpreting them concluded for that reason that they did not contain one. See *Gardner*, 202 F. Supp. at 258-259; see also *Leyvas* v. *United States*, 371 F.2d 714, 717 & n.4 (9th Cir. 1967) (adopting the reasoning of *Gardner*); *United States* v. *Garfoli*, 324 F.2d 909, 910-911 (7th Cir. 1963). Congress did not appear to have a quarrel with those decisions when it enacted Section 846, which, like its immediate precursors, omits any mention of an overt act requirement.

2. Petitioners (Br. 12-15, 18) and NACDL (Br. 7-8 & n.4) also contend that *Shabani* is not controlling because the legislative history of Section 1956(h) differs from that of the drug conspiracy statute. There is no reason to go beyond the text of Section 1956(h) and the textual similarities between that section and the statute at issue in *Shabani*. See *Lamie* v. *United States Tr.*, 124 S. Ct. 1023, 1031 (2004) ("We should prefer the plain meaning since that approach respects the words of Congress" and "avoid[s] the pitfalls that plague too quick a turn to the more controversial realm of legislative history."). But even if this Court were to consider legislative history in the face of an unambiguous statute, there is nothing in the legislative history of Section 1956(h) to support petitioners' contention that Congress meant to contravene the clear wording of the statute omitting an overt act requirement. See *Salinas*, 522 U.S. at 57 ("[O]nly the most extraordinary showing of contrary intentions in the legislative history will justify a departure from th[e] [statutory] language.") (internal quotation marks omitted). To the contrary, the legislative history confirms that Congress modeled Section 1956(h) on the drug conspiracy statute at issue in *Shabani*.

Section 1956(h) was passed as part of the Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, § 1501, 106 Stat. 4044 (1992), which included vari-

ous money laundering enforcement improvements.[10] Similar bills had been proposed in 1990, 1991 and 1992,[11] and they included a provision for money laundering conspiracies (subsequently enacted and codified at Section 1956(h) without material change) whose structure and language, by design, mirrored that of 21 U.S.C. 846. See, *e.g.*, 137 Cong. Rec. 21,997, 22,001 (1991) (section analysis of Money Laundering Improvements Act of 1991 (S. 1665) provides that Section 209, the money laundering conspiracy provision, "is modeled on the penalty provision for drug conspiracies in 21 U.S.C. § 846"). Indeed, the language of Section 1956(h) is virtually identical to the language of 21 U.S.C. 846. By choosing, as its prototype, a text without an overt act requirement and by failing to add the overt act language from 18 U.S.C. 371, Congress evidenced its intent to omit that requirement. See *Shabani*, 513 U.S. at 13 ("[W]e have not inferred [an overt act] requirement from congressional silence in other statutes").

Petitioners rely not on any "extraordinary showing" of Congress's contrary intent, but rather on silence in the legislative history concerning any intent to dispense with the overt act requirement that existed when money laundering conspiracies were prosecuted under Section 371. But congressional silence on this score is

[10] The money laundering conspiracy provision was originally codified at 18 U.S.C. 1956(g), but Congress re-designated the provision at 18 U.S.C. 1956(h) as part of the Money Laundering Suppression Act of 1994, Pub. L. No. 103-325, Tit. IV, § 401, 108 Stat. 2243.

[11] *E.g.*, the Omnibus Crime Act, S. 1970, 101st Cong., 2d Sess. § 2437 (1990); Money Laundering Improvements Act of 1991, S. 1665, 102d Cong., 1st Sess. § 209; Comprehensive Deposit Insurance Reform and Taxpayer Protection Act of 1991, S. 543, 102d Cong., 1st Sess. § 951; Federal Housing Enterprises Regulatory Reform Act of 1992, S. 2733, 102d Cong., 2d Sess. § 1051.

hardly surprising; there was not, as petitioners contend, any "long-standing [overt act] requirement" (Pet. Br. 11) for money laundering conspiracies *as such*. Any history of proving an overt act resulted only from the fact that, before the enactment of Section 1956(h), no specific money laundering conspiracy provision existed. By necessity, that offense was prosecuted under the general conspiracy statute, 18 U.S.C. 371, which by its terms expressly requires an overt act. To the extent that history is relevant, it suggests that Congress created a new money laundering conspiracy offense in order to punish that crime more severely in a statute that omits an overt act requirement; that history thus reflects a congressional purpose to deviate from restrictions in Section 371. Cf. Model Penal Code and Commentaries Part I, § 5.03, at 453 (1985) (proposing that overt act requirement be dispensed with when the objective of the agreement is harmful enough to warrant "preventive intervention").

This Court has rejected similar arguments that Congress's silence with respect to an intent to dispense with an overt act requirement should be construed as an intent to retain it. In *Shabani*, this Court rejected the defendant's argument that the Court should read an overt act requirement into Section 846 unless Congress somewhere expressly stated its intention to omit one. 513 U.S. at 13, 17.[12] It is no answer to say (Pet. Br. 19)

[12] This Court has rejected arguments from congressional silence in other contexts. See, *e.g.*, *United States* v. *Wells*, 519 U.S. 482, 497 (1997) (rejecting argument that statute omitting an express materiality requirement should be read to include one in the absence of an expression in the legislative history of congressional intent to delete the materiality requirement that had attached to some provisions that statute incorporated); *Carter* v. *United States*, 530 U.S. 255, 270-271 & n.9 (2000) (rejecting argument that statute omitting express intent-to-steal element should be read to

that *Shabani* is irrelevant here because it was decided after Congress enacted Section 1956(h). *Shabani* was only a recent application of the longstanding rule of construction announced in *Singer* and *Nash*, of which Congress is presumed to be aware. *Albernaz* v. *United States*, 450 U.S. 333, 341-342 (1981) (this Court "assume[s] that our elected representatives * * * know the law") (internal quotation marks omitted). Petitioners contend (Br. 19-20) that those cases, decided in 1945 (*Singer*) and 1913 (*Nash*), were too old to provide meaningful guidance by the time Section 1956(h) was enacted in 1992. The *Shabani* Court, however, did not hesitate to apply the interpretive rule of those cases to a statute enacted in 1970, and there is no reason for a different result here. Indeed, a firmly entrenched interpretive principle does not lose force merely because it has not been applied in a recent case. See *Albernaz*, 450 U.S. at 342 (stating that, if anything was to be assumed from congressional silence, it was that Congress in 1970 was aware of a 1932 Supreme Court decision).

3. Petitioners also contend that Section 1956(h) is solely a "penalty provision."[13] Pet. Br. 16. Although the purpose of the new statute undoubtedly was to enhance the penalty for money laundering conspiracies, Congress achieved that purpose by enacting a new statutory provision that defined a freestanding offense: conspiracy to commit an offense defined in Section 1956 or 1957.

include one in the absence of an expression in the legislative history of congressional intent to delete the element, which was in the previous version of the statute).

[13] Petitioners have not previously raised this argument. Indeed, they never claimed that count two failed to charge an offense on the ground that 18 U.S.C. 1956(h) is merely a penalty provision.

The language of Section 1956(h) clearly establishes a substantive offense. It is undisputed that 21 U.S.C. 846 establishes a substantive offense, and Section 1956(h)'s language is identical to that of Section 846 in all material respects. Both provisions subject to criminal sanction "any person" who "conspires to commit any offense" specified elsewhere. Section 1956(h) thus contains all the elements of the common law conspiracy offense, which "does not make the doing of any act other than the act of conspiring a condition of liability." *Nash*, 229 U.S. at 378. That Section 1956(h) also identifies the penalties for the offense does not change the analysis. Section 846 and countless other provisions of the federal criminal code that define offense conduct also identify the penalties in the same sentence. See, *e.g.*, 18 U.S.C. 1014 (Supp. I 2001); 18 U.S.C. 1016-1019. In addition, the act of conspiring to do something unlawful has traditionally been considered a criminal offense. Although Congress has at times considered making the specific *object* of a conspiracy a factor that could increase the penalty for the act of conspiring in violation of 18 U.S.C. 371, it has consistently chosen to follow a different course by enacting freestanding "crime-specific conspiracy provisions." Pet. Br. 12 n.8.[14]

Petitioners' reliance on the fact that "the session law containing the new Section 1956(h) was entitled 'Penalty for Money Laundering Conspiracies'" (Br. 14) is

[14] Petitioners' argument might have greater plausibility if Congress had amended Section 371 to add an enhanced penalty for money laundering conspiracies. As petitioners recognize (Br. 12-13), however, the House bill that contained such a proposal was never enacted. See H.R. 26, 102d Cong., 1st Sess. (1991). Moreover, as petitioners further recognize (Br. 12 n.8), Congress has eschewed amending Section 371 as a means to increase the punishment for conspiracies to commit particularly serious crimes.

not helpful to them, because the plain language of Section 1956(h) and historical practice leave no doubt that Congress established a money laundering conspiracy offense, not a sentencing factor. See *Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) (noting that "heading of a section" is "tool[] available for *the resolution of a doubt* about the meaning of a statute") (emphasis added); *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 212 (1998) (disregarding "petitioners' invocation of the statute's title" because "the title of a statute * * * cannot limit the plain meaning of the text"). The "penalty" title in the session law would not be helpful to petitioners in any event, because such a title "certainly [does] not always signal[] a provision that deals with penalties for a substantive crime." *Almendarez-Torres*, 523 U.S. at 234 (citation omitted). See *Castillo* v. *United States*, 530 U.S. 120, 125 (2000) ("The title of the entirety of § 924 is 'Penalties,'" yet parts of that Section create "not penalty enhancements, but entirely new crimes.").

Petitioners do not explain how Section 1956(h) would function as a penalty provision. To the extent they are suggesting that it was intended to serve as a penalty provision for a money laundering conspiracy charged pursuant to Section 371, they cite no support for the proposition that a penalty provision in one statute can serve as a penalty provision for another without any cross-reference in the text to that effect. To the contrary, penalty provisions in the criminal code explicitly link the punishment to a violation of a specific section or subsection. See, *e.g.*, 18 U.S.C. 924(a)(2) ("whoever knowingly violates [enumerated subsections] of section 922 shall be fined [as provided by law]"). Indeed, the subsection at issue in *Almendarez-Torres*, upon which petitioners rely, makes clear that it is referring to an

alien who violates the law as described in the immediately preceding subsection. See 8 U.S.C. 1326(a) and (b).

4. Petitioners also seek to distinguish *Shabani* (Br. 20-23) on the ground that the drug conspiracy statute is in its own section of the United States Code, whereas the money laundering conspiracy statute is in a subsection. It is doubtful that placement of a conspiracy provision in a subsection rather than its own separate section could ever affect the determination whether an overt act is required. In recent years, Congress has established new conspiracy statutes by placing them in discrete sections of the United States Code, see 18 U.S.C. 1349; by adding, as was the case in 18 U.S.C. 1956(h), new subsections to existing sections of the Code, see, *e.g.*, 18 U.S.C. 844(m), 18 U.S.C. 924(n), 18 U.S.C. 1028(f); and by adding the phrase "conspires to" to the other prohibitions in the statute, see, *e.g.*, 18 U.S.C. 115, 18 U.S.C. 931(c), 18 U.S.C. 1958(a). In addition, Congress established conspiracy provisions containing overt act requirements as subsections of 18 U.S.C. 1831 and 1832 rather than as separate sections of the Code. 18 U.S.C. 1831(a)(5); 18 U.S.C. 1832(a)(5). Whether a conspiracy provision contains an overt act requirement does not depend on the placement of the offense within a statute, but on the language used to define the offense. Here, in light of the virtually identical language in the drug conspiracy statute and the money laundering conspiracy statute, the two should receive the same construction.

5. Finally, petitioners contend (Br. 20, 24-28) that this case diverges from *Shabani* because, they assert, a venue provision for money laundering cases enacted in 2001, 18 U.S.C. 1956(i) (Supp. I 2001), demonstrates that Congress imposed an overt act requirement in

Section 1956(h). That is incorrect. There is no reason to read a venue provision as modifying the substance of the underlying criminal prohibition. Moreover, Section 1956(i) does not define proper venue solely by reference to the place of an overt act. Even if it were so limited, Section 1956(i) is permissive and is therefore not the exclusive means to establish venue for conspiracy to launder money.

Section 1956(i) was added pursuant to the USA PATRIOT Act.[15] It addressed an issue raised by this Court in *United States* v. *Cabrales*, 524 U.S. 1 (1998), which held that Missouri was not a proper venue for the prosecution of substantive money laundering offenses that allegedly occurred entirely in Florida, even though the underlying illegal activity that allegedly generated the funds occurred in Missouri. Section 1956(i)(1)(B) makes clear that a substantive money laundering prosecution may be brought in the district in which the underlying specified unlawful activity took place, provided that the defendant participated in the movement of the criminal proceeds from that district to the district where the financial or monetary transaction occurred. Section 1956(i) also codified the existing case law that venue for conspiracies may lie in any district in which an overt act was committed. 18 U.S.C. 1956(i)(2) (Supp. I 2001).

Contrary to petitioners' contention, the provision for laying venue where an overt act was committed does

[15] Section 1956(i) provides, in pertinent part, that "[a] prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought in the district where venue would lie for the completed offense under paragraph (1), or in any other district where an act in furtherance of the attempt or conspiracy took place." 18 U.S.C. 1956(i)(2) (Supp. I 2001). See p. 2, *supra*, for the text of paragraph (1).

not presuppose that an overt act is required to establish a violation of Section 1956(h). First, the venue rules set forth in Section 1956(i) do not limit venue to districts in which an overt act occurred. Indeed, Section 1956(i)(2) is phrased in the disjunctive. It specifically provides that, in a case of an attempt or conspiracy, a prosecution "may be brought in the district where venue would lie for the completed offense" *or* "in any other district where" an overt act took place. 18 U.S.C. 1956(i)(2) (Supp. I 2001). The first alternative provides venue for the prosecution of a conspiracy based on where the case could have been brought *if* the object of the conspiracy had been accomplished. The application of that venue rule turns on the substance of the unlawful agreemen—specifically, where the contemplated money laundering that the conspirators agreed to commit was to have taken place. Venue is proper in such a district under the statute even if no overt act is committed there.[16]

Even if Section 1956(i)(2)'s venue rules did turn on commission of an overt act, that section does not *require* an overt act because that section is permissive. It does not purport to preclude prosecution in a district in which "the offense was committed." Fed. R. Crim. P. 18.[17] Because common law conspiracy is committed

[16] For example, had petitioners and their co-conspirators agreed to take proceeds from their fraud and launder them in Florida, but never accomplished their objective or committed an overt act, venue for the conspiracy offense would lie in Florida under the first clause of Section 1956(i)(2).

[17] Rule 18 of the Federal Rules of Criminal Procedure states in relevant part: "Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed." There is no provision in Section 1956(i) that renders it the exclusive means for laying venue for a money laundering conspiracy prosecution. Rather, Section 1956(i) is explicitly written in a *permissive* fashion, describing where a pro-

wherever the illegal agreement was formed, a prosecution can always be commenced in that district, even if an overt act was committed elsewhere, or if no overt act was committed at all. See *Hyde* v. *Shine*, 199 U.S. 62, 76 (1905) ("We have ourselves decided that, if the conspiracy be entered into within the jurisdiction of the trial court, the indictment will lie there."); 4 Wayne R. LaFave et al., *Criminal Procedure* § 16.2(f), at 536 (2d ed. 1999) ("The prosecution in a conspiracy charge may be brought as to all conspirators in * * * the district in which the conspiracy was formed (i.e., the district of agreement)."); see also *Cabrales*, 524 U.S. at 9 ("If the Government can prove the agreement it has alleged, Cabrales can be prosecuted in [the district in which the unlawful agreement was formed].").

Second, it was well established at the time Congress enacted Section 1956(i)(2) that venue in conspiracy cases lies where an overt act occurred *regardless* of whether such an act is an element of the conspiracy offense. Indeed, applying the common law rule, this Court has repeatedly recognized that, in conspiracy

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secution "may be brought." Cf. 18 U.S.C. 3238 ("The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, *shall be* in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought.") (emphasis added). Section 1956(i), which, as petitioners acknowledge (Br. 24), was designed to codify this Court's suggestion in *Cabrales*, 524 U.S. at 8, that venue in a money laundering case could be laid where the underlying crime occurred in certain specified circumstances, thus expands the government's options for venue; it does not preclude the government from relying on the place-of-the-offense provision in Rule 18. Cf. *Cortez Byrd Chips, Inc.* v. *Bill Harbert Constr. Co.*, 529 U.S. 193, 198-204 (2000) (rejecting restrictive interpretation of venue provisions of the United States Arbitration Act, ch. 213, 43 Stat. 883).

cases brought under statutes that do not contain an overt act requirement, venue lies either where the agreement was formed *or* where an overt act was committed.[18] See, *e.g.*, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 252 (1940) (holding that Western District of Wisconsin was proper venue for Sherman Act conspiracy charge, which did *not* require proof of overt act, because, while the conspiracy was formed elsewhere, "there was ample evidence of * * * overt acts in that district"); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 402-404 (1927) (reinstating conviction on Sherman Act conspiracy charge where evidence showed that overt acts were committed in district of trial); see also *Hyde*, 225 U.S. at 365-367 (discussing common law rule); 18 U.S.C. 3237(a) ("[A]ny offense * * * begun in one district and completed in another, or committed in more than one district, may be * * * prosecuted in any district in which such offense was begun, continued, or completed.").

Lower courts have likewise applied the common law rule for venue in conspiracy cases to modern conspiracy statutes that do not require proof of an overt act. See, *e.g.*, *United States* v. *Haire*, 371 F.3d 833, 838 (D.C. Cir. 2004) (applying, in prosecution under 21 U.S.C. 846 and 963, "well established rule that prosecutions for conspiracy may be brought in any district in which some overt act in furtherance of the conspiracy was committed by any of the co-conspirators") (internal quotation marks omitted), petition for cert. pending, No. 04-6419 (filed Sept. 3, 2004); *United States* v. *Antonakeas*,

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[18] The rationale for the common law venue rule "was that the overt act, although not an element of the offense, constituted a 'renewal' or 'continuation' of the agreement and thus carried its commission into the district of that act." LaFave, et al., *Criminal Procedure*, *supra*, § 16.2(f), at 537.

255 F.3d 714, 726 (9th Cir. 2001) (holding that, in conspiracy under Section 846, "[v]enue for a conspiracy charge is appropriate in any district where an overt act committed in the course of the conspiracy occurred") (internal quotation marks omitted); *United States* v. *Romero*, 150 F.3d 821, 824 (8th Cir. 1998) ("[A]lthough separate proof of an overt act is not a necessary element of a drug conspiracy under 21 U.S.C. § 846, venue is proper * * * in any jurisdiction in which an overt act * * * was committed.") (citation and internal quotation marks omitted).

In light of the common law rule on venue in conspiracy cases and the application of that rule by the courts, including this one, to modern conspiracy statutes that omit an overt act requirement, there is no warrant for inferring that Congress must have believed that an overt act was an element of Section 1956(h) when it enacted the overt act provision in the venue statute. Instead, the common law rule on venue suggests that Section 1956(i) should be read simply as regulating venue, as it purports to do, and not as indirectly amending the conspiracy statute to overcome the common law definition of conspiracy.

Accordingly, Section 1956(i) cannot be read to "ratif[y]" (Pet. Br. 20) the view of those courts of appeals, see note 8, *supra*, that have stated that an overt act is an element of Section 1956(h).[19] The venue provision did not modify the elements of the offense.

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[19] Petitioners (Br. 26-28 & n.15) also suggest that ratification of the view of those courts can be found in the fact that Congress has amended the money laundering statutes several times without explicitly rejecting those decisions. Congress's failure to repudiate those decisions, however, is of no weight when dealing with "language as plain" as found in Section 1956(h). Cf. *Demarest* v. *Manspeaker*, 498 U.S. 184, 190 (1991) ("Where the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction.") Moreover, Congress has not made any substantive changes to Section 1956(h), and any inference from congressional inaction is "treacherous" at best. *United States* v. *Wells*, 519 U.S. 482, 496 (1997). In any event, the circuits have not uniformly read an overt act requirement into Section 1956(h). Even in those that did, the courts of appeals did not analyze that issue, and the defendants' convictions were affirmed. See note 8, *supra*. Under those circumstances, "even if silence could speak, it could not speak unequivocally to the issue here." *Wells*, 519 U.S. at 496.

D. Congress's Definition Of The Elements Of The Offense And Its Penalties Is Entitled To Great Deference

Petitioners describe money laundering conspiracy as a "doubly derivative crime" (Br. 28) that imposes a 20-year maximum sentence when the underlying crime from which the illegal funds are generated and the conspiracy to commit that crime may require considerably less. The inclusion of an overt act requirement would be desirable as a policy matter, they argue, because it ensures that defendants do not face Section 1956(h)'s higher penalties unless a co-conspirator has committed some act beyond the defendants' illegal agreement, thus demonstrating that the crime is not "too inchoate." Pet. Br. 30-32. Without acknowledging the apparent contradiction, petitioners also concede that "[a]n overt act requirement has seldom materially increased the difficulty in securing conviction for conspiracy," because "virtually any act will satisfy the * * * requirement." *Id.* at 32.

Petitioners' policy argument is misdirected. The unambiguous language of Section 1956(h), and this Court's decisions holding that conspiracy statutes that do not mention an overt act requirement will not be read to include one, control the interpretive issue. In

any event, the argument lacks merit, because it ignores the fact that Congress, in defining the elements of the offense and setting the punishment, made a judgment, reflected in the statutory text, about the appropriate coverage of Section 1956(h) and its sanctions. This Court has long made clear that it defers to the legislature in making those policy judgments. See, *e.g.*, *Staples* v. *United States*, 511 U.S. 600, 604 (1994) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.") (quoting *Liparota* v. *United States*, 471 U.S. 419, 424 (1985)); *Gore* v. *United States*, 357 U.S. 386, 393 (1958) ("Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, these are peculiarly questions of legislative policy.") (citation omitted).

Congress intended the punishment for money laundering offenses "to convey the seriousness with which the Committee views money laundering activity, and the importance of deterring such activity for the public good." S. Rep. No. 433, 99th Cong., 2d Sess. 12 (1986); see H.R. Rep. No. 855, 99th Cong., 2d Sess. 7-10, 16 (1986).[20] Any disparity between the sanctions for the underlying offense and the substantive money laundering crime thus reflects Congress's intent to punish the crimes disparately. And because Congress chose to

[20] Indeed, the 1986 legislation reflected Congress's determination to combat money laundering, a "pervasive[]" problem that Congress found is inextricably tied to drug trafficking and organized crime. S. Rep. No. 433, *supra*, at 2-4. And Congress more recently has sought to address the symbiotic relationship between money laundering and international terrorism. See, *e.g.*, International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001, Pub. L. No. 107-56, § 301, 115 Stat. 296.

punish money laundering conspiracy as harshly as the substantive money laundering offense, see 18 U.S.C. 1956(h), any differences between that penalty and the ones for conspiring to commit the specified unlawful activity are similarly deliberate. Indeed, petitioners emphasize throughout their brief that Congress's whole purpose in enacting Section 1956(h) was to increase the penalties for money laundering conspiracies beyond the penalties available for conspiracies charged under Section 371.

An overt act requirement would not mitigate that disparity, as petitioners concede (Br. 30). Nonetheless, they contend that it serves the significant purpose of demonstrating a defendant's "clear resolve and intent to commit the crime." *Ibid.* That position ignores the fact that overt acts need not be illegal, see, *e.g.*, *Yates* v. *United States*, 354 U.S. 298, 334 (1957), or even substantial, and have been described as "the slightest action on the part of the conspirators." Paul Marcus, *Prosecution and Defense of Criminal Conspiracy Cases* § 2.08(3), at 2-81 (2004) (internal quotation marks omitted); see Model Penal Code and Commentaries Part I, § 5.03, at 454 (1985) ("[I]t has been well settled that any act in pursuance of the conspiracy, however insignificant, is sufficient.").

E. The Rule Of Lenity Does Not Apply To Unambiguous Statutes

Finally, contrary to petitioners' contention (Br. 33-35), the rule of lenity has no application here. That rule "applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute." *Shabani*, 513 U.S. at 17; accord *Staples*, 511 U.S. at 619 n.17. That was not the case in *Shabani*, and, for the same reasons, that is not the case here.

Petitioners' reliance (Br. 34) on *Taylor* v. *United States*, 495 U.S. 575 (1990), is misplaced. There, the Court rejected the view that 18 U.S.C. 924(e), a provision that enhances sentences based on prior convictions, including convictions for "burglary," incorporated the common law definition of burglary. The Court explained that "the contemporary understanding of 'burglary' has diverged a long way from its common-law roots," *Taylor*, 495 U.S. at 593, such that adopting the common law definition "would not comport with the purposes of the enhancement statute," *ibid.* By contrast, there is no indication here that punishing money laundering conspiracies without proof of an overt act would undercut Congress's purposes, or that the common law rule that no overt act is required to prove a conspiracy has been entirely supplanted by later developments.[21]

[21] The Court should not address petitioners' request (Br. 7 n.6) to dispose of the case consistent with *United States* v. *Booker*, No. 04-104, and *United States* v. *Fanfan*, No. 04-105, because petitioners did not raise a Sixth Amendment claim in the court of appeals or in their petitions for certiorari, and the single question on which this Court granted certiorari does not encompass such a claim. See *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992).

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE
Supreme Court of the United States

David Whitfield,
Petitioner,
v.
United States of America,

Haywood Eudon Hall,
Petitioner,
v.
United States of America.

On Writs of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

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REPLY BRIEF FOR THE PETITIONERS

The central question in this case is one of congressional intent: when Congress enacted 18 U.S.C. 1956(h) to enhance the penalties for money laundering conspiracy, did it also intend, *sub silentio*, to abandon the overt act requirement that had always been an essential element of the offense? As petitioners' opening brief demonstrated, the answer to this question is "no." The legislative history, structure, text, and unique nature of the money laundering statute refute the Government's contention that Congress intended to authorize prosecutions for nothing more than mere agreements to launder money.

The overt act requirement serves a critical and unique function in money laundering conspiracy cases. Because *every* financial crime is intended to generate proceeds, and because the breadth of the money laundering laws encompasses a wide range of otherwise innocuous financial transactions, there is a real danger that *any* agreement to commit a financial crime will also constitute conspiracy to launder money in the absence of an overt act requirement. Defendants would thus face severe sentences for merely agreeing to commit financial crimes, even if they take no action toward effectuating that agreement.[1] As this Court has repeatedly noted, the overt act requirement is perfectly suited to prevent such irrational punishment for crimes when no person ever acted upon the agreement. See, *e.g.*, *United States* v. *Britton*, 108 U.S. 199, 204-05 (1883) (overt act requirement "affords a *locus poenitentice*, so that before the

[1] See, *e.g.*, Pet. Br. 26-27 (noting possibility that defendant could be prosecuted for agreeing to conceal the proceeds from selling livestock or crops pledged as security against a Farmers Home Administration Loan, even if he takes no action toward that goal and could not be prosecuted for the underlying offense (18 U.S.C. 658), conspiracy to commit that offense, or substantive money laundering).

act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute"); *Hyde* v. *United States*, 225 U.S. 347, 358 (1912) (quoting *Britton*); *Bannon* v. *United States*, 156 U.S. 464, 469 (1895) (same).

To be sure, there are instances in which Congress elects to omit any overt act requirement. Yet the Government is unable to point to *any evidence* that Congress intended to do so here or articulate *any reason* why it would have intended to do so. Petitioners' opening brief demonstrated, and the Government does not dispute, that the overt act requirement has never presented an obstacle to meritorious conspiracy prosecutions. Instead, it has served only as an essential bulwark against prosecutions in which the Government fails to offer *some* proof that the defendants have taken *some* step beyond simply agreeing to commit *some* crime that will generate proceeds. This failure to articulate any reason why Congress would have sought to remove the overt act requirement is particularly striking when (1) many of the specified unlawful activities which give rise to liability under Section 1956(h) are themselves punished with far lower sentences than those available under Section 1956(h), see Pet. Br. 24-25, and (2) the Government itself concedes that it is often difficult to distinguish between money laundering offenses and the underlying financial crimes. See, *e.g.*, *United States* v. *Piervinanzi*, 23 F.3d 670, 682 (CA2 1994) (quoting the U.S. Dep't of Justice, United States Attorneys' Manual Staff, Memorandum re: Money Laundering Prosecutions and Forfeitures, Oct. 1, 1992, for its candid acknowledgement that "where the financial and money laundering offenses are so closely connected with each other," there is a risk that there will be "no clear delineation between the underlying financial crime and the money laundering offense").

I. SECTION 1956(h) MERELY IMPOSES A PENALTY APPLICABLE TO MONEY LAUNDERING CASES FOR THE OFFENSE OF CONSPIRACY DEFINED IN SECTION 371.

The Government's principal argument for the proposition that Congress intended to abandon the preexisting overt act requirement rests on *United States* v. *Shabani*, 513 U.S. 10 (1994), and the drug conspiracy offense provision of 21 U.S.C. 846. There, the Court relied on statutory silence to conclude that Section 846 adopted the common law definition of conspiracy, and therefore did not require proof of an overt act. The Government argues that because Sections 1956(h) and 846 have similar language, the *Shabani* analysis should control. This heavy reliance on *Shabani* is superficially attractive yet misplaced.

Petitioners' principal argument is *not* that, despite *Shabani*, an overt act requirement should be read into the substantially similar language of Section 1956(h). Rather, as petitioners' opening brief explained, the overt act requirement for money laundering conspiracies arises from 18 U.S.C. 371, the general conspiracy provision that defines the *offense* of conspiracy. Section 1956(h) does not explicitly include the overt act requirement for the obvious and straightforward reason that its purpose was to set forth the *penalty* for the money laundering conspiracy offense.[2]

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[2] See, *e.g.*, Pet. Br. 7 ("Section 1956(h) was not intended to eliminate the overt act requirement that had applied to money laundering conspiracies when they were prosecuted under 18 U.S.C. 371 * * * ."); *id.* at 8 ("Congress intended to create a 'specific offense' when it enacted Section 846, rather than a 'penalty' provision as it did with Section 1956(h)."); *id.* at 11 n.8 ("Nothing in these discussions [in the legislative history] – which referred interchangeably to conspiracy statutes that contained overt act requirements and statutes that omitted them – suggests that in changing the penalties for various conspiracies, Congress also meant to change the pre-existing elements."); *id.* at 12 ("Section 1956(h) did nothing more than increase the penalty for money laundering conspiracies, and therefore does not redefine the elements of the crime * * * ."); *ibid.* (discussing *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), which held that 8 U.S.C. 1326(b) "merely dealt with penalties and did not affect the substantive elements of any crime"); *id.* at 14 ("If Congress had intended the money laundering conspiracy provision to be another substantive offense rather than simply an increased penalty provision, it would have once again amended Section 1956(a) to add a new paragraph prohibiting money laundering conspiracies."); *id.* at 14-15 ("Thus, the structure of Section 1956 demonstrates that the sole purpose of Section 1956(h) was to increase the penalty for money laundering conspiracies, not to create a substantive conspiracy offense or to otherwise alter the long-standing overt act requirement."); *id.* at 19 (distinguishing *Shabani* on the ground that "some conspiracy statutes, like Section 1956(h), were clearly passed not to change the elements of conspiracy, but to increase the available penalties").

Prior to the enactment of Section 1956(h), the Government uniformly prosecuted money laundering conspiracies under Section 371.[3] The latter statute expressly requires the Government to allege and prove an overt act, for it applies only: "[i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, * * * and one or more of such persons *do any act to effect the object of the conspiracy* * * *." 18 U.S.C. 371 (emphasis added). Indeed, the Government cites Section 371 as the prototypical statute under which "Congress has expressly included an overt act requirement." U.S. Br. 10-11.

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[3] In addition to the cases cited in petitioners' opening brief (at 9), see, *e.g.*, *United States* v. *Conley*, 37 F.3d 970 (CA3 1994); *United States* v. *Vargas*, 986 F.2d 35 (CA2 1993); *United States* v. *Fuller*, 974 F.2d 1474 (CA5 1992); *United States* v. *Franklin*, 902 F.2d 501 (CA7 1990).

Certainly, neither the text nor the legislative history of Section 1956(h) suggests that Congress enacted that provision to shift prosecutions away from Section 371, and Congress has never amended Section 371 to exclude money laundering cases. The Government does not contend otherwise. As petitioners' opening brief established, Congress enacted Section 1956(h) merely to enhance the penalty for conspiracy in money laundering cases. Indeed, the point is not disputed: the Government acknowledges without qualification that "the purpose of the new statute *undoubtedly* was to enhance the penalty for money laundering conspiracies * * *." U.S. Br. 20 (emphasis added). Section 371 thus imposes a maximum term of five years; under Section 1956(h), it is ten or twenty years, depending on whether the defendant conspires to violate Sections 1956 or 1957.

The Government nonetheless contends that, despite Congress's avowed purpose in enacting Section 1956(h), Congress in that provision (perhaps unwittingly) also created a free-standing money laundering conspiracy offense. All of the evidence is to the contrary, however.

Congress is aware, of course, how to denominate a statute an offense; it often does so, either by including explicit language in the text of the statute or by locating a new offense provision adjacent to other specific offenses within the statutory framework. See, *e.g.*, 18 U.S.C. 37(a) (including the conspiracy provision within a statutory subsection entitled "Offenses"); *id.* § 38(a)(3) (same); *id.* § 1466A(b) (same) ; *id.* § 2280(a)(1)(H) (same); *id.* § 2281(a)(1)(F) (same); *id.* § 2332a(a), (b) (same); *id.* § 2332b(a)(2) (same); *id.* § 2332f(a)(2) (same); *id.* § 2339A(a) (same); *id.* § 2339C(a)(2) (same).

There is, however, no such evidence that Congress intended the conspiracy provision of Section 1956(h) to establish an offense. As enacted by Congress, the title of the statute is clear: Congress expressly denominated Section 1956(h) a "penalty." See Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, 106 Stat. 4044, 4066

(1992) (entitling § 1530 "Penalty for Money Laundering Conspiracies").

Congress also set forth money laundering offenses in a separate provision, 18 U.S.C. 1956(a). That the conspiracy provision was instead placed among the procedural and jurisdictional elements of the statute shows that Congress envisioned it not as a new offense, but simply as an enhancement of the applicable penalty beyond Section 371's five-year statutory maximum. In this respect Section 1956(h)'s distinctive placement within the larger statutory scheme for offenses related to money laundering is distinguishable from almost all of the Title 18 conspiracy provisions and reflects Congress's intent to create a money laundering conspiracy penalty provision.[4]

Notably, the offense provisions set forth in 18 U.S.C. 1956(a)(1), (2) and (3), as well as 18 U.S.C. 1957(a), criminalize *attempts* to engage in money laundering separately from the crime of conspiracy. This again emphasizes the unique nature of Section 1956(h) among all criminal conspiracy provisions, because virtually every conspiracy statute that defines conspiracy as a specific offense includes an attempt provision as well.[5]

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[4] See Pet. Br. 18 n.12.

[5] See, *e.g.*, 21 U.S.C. 846 ("[a]ny person who attempts or conspires * * *"); 18 U.S.C. 32(a)(7) ("attempts or conspires to do anything * * *"); *id.* § 224(a) ("attempts to carry into effect, or conspires with any other person to * * *"); see also 15 U.S.C. 2; *id.* § 3(b); *id.* § 76; *id.* § 77; *id.* § 1644(a), (b); *id.* § 1693n(b)(1), (b)(2); 18 U.S.C. 37(a); *id.* § 38(a)(3); *id.* § 81; *id.* § 115(a)(1)(A), (a)(2); *id.* § 229(a)(2); *id.* § 757; *id.* § 799; *id.* § 930(c); *id.* § 1028(f); *id.* § 1203(a); *id.* § 1349; *id.* § 1362; *id.* § 1363; *id.* § 1368; *id.* § 1466A(a) , (b); *id.* § 1752(b); *id.* § 1792; *id.* § 1951(a); *id.* § 1959(a); *id.* § 1993(a)(8); *id.* § 2251(e); *id.* § 2252(b)(1), (b)(2); *id.* § 2252A(b)(1), (b)(2); *id.* § 2260(c); *id.* § 2280(a)(1)(H); *id.* § 2281(a)(1)(F); *id.* § 2332(b); *id.* § 2332a(a), (b); *id.* § 2332b(a)(2); *id.* § 2332f(a)(2); *id.* § 2339A(a); *id.* § 2339B(a)(1); *id.* § 2339C(a)(2); *id.* § 2423(e); 21 U.S.C. 844(c); *id.* § 963; *id.*

The conclusion that Section 1956(h) defines a penalty rather than an offense follows not only from the text and structure of the money laundering statutes, but also from the legislative and drafting history. The Government does not dispute that there is not an iota of support in either the drafting or legislative history for its assertion that Section 1956(h) established a new offense. Rather, as petitioners' opening brief demonstrated, both the Senate and the House considered several bills prior to the Annunzio-Wylie Anti-Money Laundering Act that would have similarly increased the penalty for conspiracy to commit money laundering. Pet. Br. 10-11. *Every* statement by sponsors of these bills demonstrates that they intended only to increase the *penalty*, not create a new offense. See, 137 Cong. Rec. S12,235, S12,236 (daily ed. Aug. 2, 1991) (statement by Sen. D'Amato describing his proposed provision as "rais[ing] the penalty for money laundering conspiracy from 5 years to whatever the penalty would be for the substantive offense that was the object of the conspiracy"); 138 Cong. Rec. S8614, S8622-23 (daily ed. June 23, 1992) (statement by Sen. Riegle describing language identical to Section 1956(h) captioned "Penalty for Money Laundering Conspiracies" in the Comprehensive Deposit Insurance Reform and Tax Payer Protection Act, S. 543, 102d Cong. (1991), as one of several *technical changes* to strengthen the money laundering laws). And Rep. Wylie made it clear that the purpose of his bill was the same: to increase the applicable *penalty*. See 138 Cong. Rec. H9802 (daily ed. Sept. 29, 1992) (statement by Rep. Wylie explaining that Section 1956(h) "increases the criminal penalties for money laundering conspiracies").

It was for this reason that the original House Resolution actually placed the money laundering punishment provision

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§ 1904(c)(2); 42 U.S.C. 2272; *id.* § 2273; *id.* § 2274(a), (b); *id.* § 2275; *id.* § 2284(a), (b); 46 U.S.C. app. 835(f); *id.* § 1903(j); 49 U.S.C. 46502(a)(2); *id.* § 46504; 49 U.S.C. 60123(b); 50 U.S.C. 167k; 50 U.S.C. app. 2410(a), (b)(1).

in Section 371. Representative Annunzio proposed the language that eventually became Section 1956(h) as an amendment to Section 371. See Money Laundering Enforcement Amendments of 1991, H.R. 26, 102d Cong. § 34 (1991). Section 371(c) would have provided: "Notwithstanding the maximum punishment provided in subsection (a), if the offense, the commission of which is the object of the conspiracy, is an offense under section 1956 or 1957, the person conspiring to commit such offense shall be subject to the same penalties as the penalties prescribed under such sections for the offense." *Ibid.* This language, slightly modified, was ultimately enacted as an addition to Section 1956, with no indication that its inclusion in the latter section of Title 18 would in any way change the elements of the conspiracy offense.

The Government maintains that the legislative history "demonstrates that Congress modeled Section 1956(h) on the drug conspiracy statute construed in *Shabani*," U.S. Br. 7, but it profoundly misstates the significance of that fact: the legislative history refers to the language of 21 U.S.C. 846 (the statute at issue in *Shabani*), but never in a way that indicates a congressional intent to enact a new offense rather than an enhanced penalty. To the contrary, the very provision that was the subject of the section-by-section analysis the Government cites – Section 209 of the unenacted Money Laundering Improvements Act of 1991, S. 1665, 102d Cong. § 209 (1991), see U.S. Br. 18 – is actually entitled "*Penalty* For Money Laundering Conspiracies." (emphasis added). And as noted *supra* at ", Senator D'Amato, the sponsor of that provision, argued that it was merely intended to raise the penalty for money laundering conspiracy. That view is further confirmed by Senator Biden – whom Senator D'Amato credited as the source of the proposed money laundering conspiracy provision. See 137 Cong. Rec. S12,235, S12,236 (daily ed. Aug. 2, 1991). Senator Biden argued that his original proposal was merely "a *technical amendment* to make consistent the *penalty* for money

laundering conspiracies with *penalties* for drug conspiracies, which carry the same penalty as the offense that is the object of the conspiracy." 136 Cong. Rec. S6636, S6639 (daily ed. May 21, 1990).

Finally, the Government denies that "a penalty provision in one statute can serve as a penalty provision for another without any cross-reference in the text to that effect." U.S. Br. 21-22. Put another way, the Government insists that Section 1956(h) cannot serve as a penalty for the offense defined in Section 371 unless it expressly so provides. There is simply no logical reason that this would be the case, as Section 371 is the only general conspiracy statute in Title 18. The Government's own practice also belies this assertion, for it has continued, after the passage of Section 1956(h), to charge money laundering conspiracy under Section 371. For example, the defendant in *United States* v. *Cabrales*, 524 U.S. 1 (1998), was charged with conspiracy to avoid transaction reporting requirements in violation of Sections 1956(a)(1)(B)(ii) and 371. See *United States* v. *Cabrales*, 109 F.3d 471 (CA8 1997). See also, *e.g.*, *United States* v. *Derman*, 211 F.3d 175, 178 (CA1 2000) (charging defendant with money laundering conspiracy under Section 371); *United States* v. *Abuhouran*, 161 F.3d 206, 208 (CA3 1998) (same); *United States* v. *Jenkins*, 78 F.3d 1283, 1286 (CA8 1996) (same).

If Section 1956(h) in fact abandoned the overt act element that Section 371 retains, it is hard to see why the Government would prosecute defendants under a statute that is substantially more favorable to defendants, because it imposes a *greater* burden of proof on the Government while authorizing a far *lighter* penalty. The question is: what did Congress intend? The answer would be obvious if the statute included an express cross-reference, but the ambiguity of the language as actually enacted is not sufficient to convert the statute into a free-standing criminal offense, particularly when *every* indication – from the text, the structure, the legislative

history, and the drafting history – is that Congress enacted Section 1956(h) merely to impose a higher penalty.[6]

The additional arguments raised by the Government to support its contention that Section 1956(h) is an offense provision which reverts to the common law and abandons the overt act requirement are simply unpersuasive. The Government argues that "[t]he language of Section 1956(h) clearly establishes a substantive offense" because "[i]t is undisputed that 21 U.S.C. 846 establishes a substantive offense, and Section 1956(h)'s language is identical to that of Section 846 in all material respects." U.S. Br. 21. This is a *non sequitur*: the fact that the language of Section 1956(h) *can* establish an offense does not imply that it *does* in every context. To the contrary, it is indisputable that the language of 1956(h) in certain contexts is instead read more naturally as a penalty provision. Thus, if – as was originally intended – the language appeared instead as a subdivision of the general conspiracy statute, Section 371, no one would seriously argue

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[6] On this score, the government's assertion that a penalty provision in one statute cannot incorporate another without an explicit cross-reference, U.S. Br. 22, is entirely beside the point. Petitioners' argument requires no incorporation because, as we have shown, Section 371 is indisputably the offense for which Section 1956(h) provides the penalty enhancement. But in any event, the Government is wrong to assert that there would be no basis for allowing implicit incorporation of another statutory provision. This Court has held that statutes can implicitly incorporate the meaning of both common law principles – see, *e.g.*, *Neder* v. *United States*, 527 U.S. 1 (1999) (incorporating common law requirement of materiality as an element of federal mail, wire, and bank fraud offenses); *Holmes* v. *Sec. Investor Prot. Corp.*, 503 U.S. 258 (1992) (holding that RICO's civil action provision, like those in the Sherman and Clayton Acts, implicitly incorporates common law principles of proximate cause) – and other statutory provisions – see generally, *Clay* v. *United States*, 537 U.S. 522 (2003) (holding that 28 U.S.C. 2255 implicitly incorporates 28 U.S.C. 2244(d)(1)(A)'s definition of finality for federal habeas cases).

that it defined a free-standing conspiracy offense. Instead, its reference to conspiring would incorporate the elements of the conspiracy offense – including the requirement of an overt act – set forth in the original language of Section 371, and it would establish an increased penalty.

The same point is a complete answer to the Government's contention that the more natural inference from the text of Section 1956(h) is that Congress intended to enact a substantive offense: "By choosing a text modeled on the Sherman Act and the drug conspiracy statute, Congress dispensed with the overt act requirement for money laundering conspiracies." U.S. Br. 7. Again, that does not follow. The language of Section 1956(h) can serve equally as an offense or a penalty, depending on context. In this context, it is a penalty.

II. EVEN IF SECTION 1956(h) DEFINES AN OFFENSE, AS THE GOVERNMENT CONTENDS, THAT OFFENSE INCLUDES THE ELEMENT OF AN OVERT ACT.

If this Court were to conclude, contrary to the foregoing, that Section 1956(h) itself enacts a new money laundering conspiracy offense, it would not follow that Congress intended to abandon the overt act requirement and revert to the common law definition of conspiracy. As *Shabani* itself recognized, the presumption that congressional silence reflects an intent "to adopt the common law definition of statutory terms" will control only "absent contrary indications." 513 U.S. at 13. As petitioners' opening brief demonstrated, Pet. Br. 13-17, there are several significant indications of contrary legislative intent.

First, the argument that silence indicates a continuity of interpretation, which the Government advanced in *Shabani*, see U.S. *Shabani* Reply Br. at 12, cuts in petitioners' favor. Prior to the enactment of Section 846, Congress had created other drug conspiracy statutes – 21 U.S.C. 174 and 18 U.S.C. 176a – that were held not to require proof of an overt act.

Thus, it was reasonable to infer that Congress intended Section 846 to carry forward this absence of an overt act requirement. By contrast, prior to the enactment of Section 1956(h), money laundering conspiracies had always been prosecuted under Section 371, which undeniably contains an overt act requirement. Money laundering conspiracies – in contrast to drug-related conspiracies – were never prosecuted under the common law rule. The inquiry, then, is not whether Congress, in passing Section 1956(h) intended, through silence, to add an element that was not present at common law, but rather whether Congress intended, through silence, to delete an element that was required by the predecessor statute. The Government's reliance on cases in which this Court has "held that Congress has perpetuated the common law definition of conspiracy in its criminal statutes," U.S. Br. 12, is therefore misplaced, because Section 1956(h) derives not from common law conspiracy but rather from a tradition that does require proof of an overt act.

Second, as discussed in Part I *supra*, every indication is that Congress simply intended to increase the penalty for money laundering conspiracies by enacting Section 1956(h). Congress never indicated a secondary purpose of changing the elements of the offense or easing the prosecutors' burden, and nowhere in the legislative history is there any discussion – or even the slightest mention – of removing the overt act requirement.

To be sure, Congress's purpose of increasing the penalties for money laundering conspiracy would not *inherently* preclude an ancillary intent to eliminate the overt act requirement, but were that Congress's goal there would be *some* evidence of that fact. Instead, the text and legislative history focus exclusively on punishment, with absolutely no mention of liability. Cf., *e.g.*, *Keene Corp.* v. *United States*, 508 U.S. 200 (1993) (refusing to find that the 1948 revision of the judicial code changed underlying substantive law absent a clear expression of such an intent); *Liparota* v. *United States*, 471 U.S. 419 (1985) (refusing to find that

Congress intended for food stamp fraud to be a strict liability offense given that there was no such indication in the legislative history); *Rewis* v. *United States*, 401 U.S. 808 (1971) (refusing to adopt a broad interpretation of the Travel Act given congressional silence).

Third, as petitioners' opening brief illustrated, Pet. Br. 13-15, 20-24, the text and structure of Section 1956 as a whole manifests Congress's understanding that the preexisting overt act requirement would continue to govern money laundering conspiracy prosecutions even after the adoption of Section 1956(h). The venue provision in particular reinforces this view because it expressly reflects Congress's understanding that the Government would be charging overt acts in money laundering conspiracies. See 18 U.S.C. 1956(i)(2) ("A prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought * * * in any other district *where an act in furtherance of the attempt or conspiracy took place*." (emphasis added)).

The Government makes a variety of arguments regarding Section 1956(i), none of which respond to this most basic point: the enactment of Section 1956(i) is powerful evidence that Congress continued to expect the Government to be charging overt acts in money laundering conspiracy prosecutions.[7] Conspiracy venue under Section 1956(i)(2) does not lie where the agreement is reached, but instead lie for the completed substantive money laundering offense under paragraph (1) — where the financial transaction occurs or where the underlying criminal conduct generating the unlawful proceeds takes place, provided the defendant

[7] It is indeed appropriate for this Court to look to the after-enacted venue provision to inform its understanding of Section 1956(h), as illustrated by this Court's recent decision in *Leocal* v. *Ashcroft*, ___ U.S. ___, No. 03-583, slip op. at 10 (Nov. 9, 2004) (holding that the later-enacted Section 101(h) of the Immigration and Nationality Act (INA), 8 U.S.C. 1101(h), reinforced the view that 18 U.S.C. 16 did not include DUI offenses).

participates in transporting the money from that district — or in any other district where an act in furtherance of the conspiracy takes place. Thus venue is based on the loci of the financial transactions, the specified unlawful activities, or the overt acts, but not on the loci of the agreement. This is so because Congress never intended a money laundering conspiracy to exist in the absence of an overt act.

The Government claims that this omission is inconsequential because the venue provision is permissive and therefore supplements rather than supplants 18 U.S.C. 3237. But venue provisions in criminal cases must be narrowly construed. See *United States* v. *Johnson*, 323 U.S. 273, 275 (1944) ("But if the enactment reasonably permits [a narrow construction of the venue provision], such construction should be placed upon the Act. Such construction, while not required by the compulsions of Article III, § 2 of the Constitution and of the Sixth Amendment, is more consonant with the considerations of historic experience and policy which underlie those safeguards in the Constitution regarding the trial of crimes."). Such a narrowing construction of Section 1956(i) is appropriate here, because this Court has held that "may be had" and "may be instituted" establish exclusive venue provisions. In *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148 (1976), the Court explained that a statute describing where suits "may be had" specified "the precise courts in which Congress consented to have national banks subject to suit" and concluded that it reflected Congress's intention "that in those courts alone could a national bank be sued against its will." 426 U.S. at 152 (quoting *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555, 560 (1963)). Similarly, in *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222 (1989), this Court held that 28 U.S.C. 1400(a) and (b), which provide, respectively, that "civil actions * * * may be instituted" and "civil action[s] * * * may be brought" were the exclusive venue provisions for patent infringement cases. The word "may" thus reflects permission, rather than non-exclusive

possibility (as in "counsel, you may proceed," rather than as in "it may rain on Saturday"). Nothing in the text or legislative history of Section 1956(i) suggests that the phrase "may be had" should have a different meaning than the similar language in *Radzanower* and *Fourco Glass*.

Further, if Section 1956(i) is interpreted as a permissive and non-exclusive venue provision, then much of it is surplusage. Specifically, Section 1956(i)(2)'s reference to overt acts would be redundant beacuse, as the Government notes, U.S. Br. 26-27, in the absence of a specific provision, venue would lie where any overt act occurred – regardless of whether it was an element of the conspiracy offense. Similarly, much of Section 1956(i)(1)(A) might be surplusage, because Article III, section 2, clause 4 of the Constitution, and the Sixth Amendment, already provide for the trial of offenses in the district where the crime is committed. Indeed, even parts of Section 1956(i)(1)(B), which attempted to codify this Court's holding in *Cabrales*, might be read as surplusage in a permissive venue provision, because 18 U.S.C. 3237 already provides that offenses begun in one district and completed in another, or committed in more than one district, may be prosecuted in any district in which such offense was begun, continued, or completed. This Court should thus read Section 1956(i) as exclusive, because "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (quoting *Market Co.* v. *Hoffman*, 101 U.S. 112, 115-16 (1879)).

The Government also argues that the fact that the venue provision does not define proper venue *solely* by reference to an overt act means that Congress did not foresee an overt act in every money laundering prosecution. U.S. Br. 24-25. Again, that is no answer: on the Government's view, it need *never* charge an overt act. But Section 1956(i) demonstrates that Congress did not share that understanding. And, moreover, the language to which the Government refers – that

a prosecution "may be brought in the district in which venue would lie for the completed offense," 18 U.S.C. 1956(i)(2) – simply cannot bear the weight the Government puts on it: namely, that venue is appropriate in a district where conspirators contemplate committing an underlying offense even if they take absolutely *no* steps (i.e., commit no overt act) toward completing any crime at all. This is so because the following clause reads, "or in any *other* district where an act in furtherance of the attempt or conspiracy took place." *Ibid.* (emphasis added). Congress would not have used the term "other" to refer to the "act in furtherance" unless it also understood the preceding clause to require an overt act.

Petitioners agree with the Government that when Congress enacted Section 1956(i)(2) it was well established that at common law, venue could lie where the agreement was formed or where an act in furtherance was committed, but this venue principle was not unique to money laundering conspiracies. If the only reason Congress incorporated the overt act element into Section 1956(i) was because it perceived a need to codify this general principle of common law conspiracy venue, it would have done so in a manner that applied to all of the conspiracy provisions found in Title 18 that rely on the common law. Surely the Government is not arguing that Section 1956(h) is the only conspiracy statute that relies on the common law. Yet, 18 U.S.C. 1956 is the only criminal statute with a conspiracy subsection and a venue provision that explicitly incorporates the overt act requirement.

The Government's further argument that there is overt act language in other conspiracy statutes, see U.S. Br. 23, does not prove that Congress meant to eliminate the overt act requirement in money laundering conspiracy cases. Each of these conspiracy provisions must be interpreted within the context of its statutory scheme and legislative history. Cf. *Hibbs* v. *Winn*, 124 S. Ct. 2276 (2004) (requiring that the word "assessment" be read in context because a phrase gathers meaning from the words around it); *Cortez Byrd*

Chips v. *Harbert Construction Co.*, 529 U.S. 193 (2000) (adopting a similar approach with respect to venue statutes); *Ratzlaf* v. *United States*, 510 U.S. 135 (1994) (adopting a similar approach with respect to interpreting the term "willful"). The vast majority of the statutes in which Congress expressly included an overt act requirement differ from Section 1956(h) in a critical respect: they were enacted contemporaneously with the enactment of a new statutory offense. See, *e.g.*, 18 U.S.C. 831(a)(8) (conspiracy involving transactions with nuclear materials); *id.* § 956(a)(1), (b) (conspiracy to kill, kidnap, maim, or injure in foreign country); *id.* § 1511(a) (conspiracy to obstruct state or local law enforcement). The overt act language in these statutes was necessary because as new offenses there was not an established practice of previously prosecuting these conspiracies pursuant to Section 371 and requiring the commission of an overt act.

Lastly, the Government's stare decisis argument would have far more force if there really were a "long line" of controlling cases interpreting a structurally ambiguous conspiracy subsection, but there is not. Aside from *Shabani*, *supra*, only three decisions by this Court touch upon the overt act question, and each is properly distinguished. See Pet. Br. 17-23. In *Nash* v. *United States*, 229 U.S. 373 (1913), *Singer* v. *United States*, 323 U.S. 338 (1945), and *Salinas* v. *United States*, 522 U.S. 52 (1997), the Court confronted provisions that – in square contrast to Section 1956(i) – clearly addressed the definition of the criminal offense, and the defendants in those cases were unable to muster any evidence of congressional intent that overcame the common law presumption.

In *Singer*, *supra*, the specific question was not whether the conspiracy offense required the commission of an overt act but whether the conspiracy charged in the indictment constituted an offense under section 11 of the Selective Training and Service Act of 1940. The answer turned on whether "or conspires to do so" referred to all the offenses

covered by the act or was limited to the offense immediately preceding the "or conspires to do so" language. Similarly, in *Salinas*, *supra*, the question was not whether the RICO conspiracy provision, 18 U.S.C. 1962(d), required the commission of an overt act, but rather, whether the RICO conspiracy statute required proof that the defendant agreed personally to commit two predicate acts of racketeering. In dicta, the court observed that the RICO statute did not require commission of an overt act, but that was not the issue in contention nor was the point argued by Salinas or his codefendant.

Petitioners do not contend that *Nash* and *Singer* are irrelevant because they are old. Contra U.S. Br. 20. Rather, they are properly distinguished because (1) there is no evidence in the legislative history that Congress ever considered or relied on the analysis in either case and (2) because Congress enacted Section 1956(h) before this Court's decision in *Shabani*, it could not have foreseen that this Court would later create a "formulary" based on *Nash* and *Singer* for distinguishing overt act conspiracies from common law conspiracies. The question in this case, therefore, is not whether Congress would *today* understand that failure to include an express overt act requirement in an unambiguous specific offense conspiracy statute would lead courts to require proof of an overt act, but whether the Congress that enacted Section 1956(h) manifested any intention to abandon the overt act requirement.

CONCLUSION

For the reasons stated above and in petitioners' opening brief, the judgment of the Eleventh Circuit should be reversed.

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APPENDIX A: TEXT OF 18 U.S.C. 1956 and 1957

18 U.S.C. 1956 (West Supp. 2004)

§ 1956 Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or (ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in

the United States from or through a place outside the United States--

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent--

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

(b) Penalties.--

(1) In general.--Whoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3), or section 1957, or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of--

(A) the value of the property, funds, or monetary instruments involved in the transaction; or

(B) $10,000.

(2) Jurisdiction over foreign persons.--For purposes of adjudicating an action filed or enforcing a penalty ordered under this section, the district courts shall have jurisdiction over any foreign person, including any financial institution authorized under the laws of a foreign country, against

whom the action is brought, if service of process upon the foreign person is made under the Federal Rules of Civil Procedure or the laws of the country in which the foreign person is found, and--

(A) the foreign person commits an offense under subsection (a) involving a financial transaction that occurs in whole or in part in the United States;

(B) the foreign person converts, to his or her own use, property in which the United States has an ownership interest by virtue of the entry of an order of forfeiture by a court of the United States; or

(C) the foreign person is a financial institution that maintains a bank account at a financial institution in the United States.

(3) Court authority over assets.--A court described in paragraph (2) may issue a pretrial restraining order or take any other action necessary to ensure that any bank account or other property held by the defendant in the United States is available to satisfy a judgment under this section.

(4) Federal receiver.--

(A) In general.--A court described in paragraph (2) may appoint a Federal Receiver, in accordance with subparagraph (B) of this paragraph, to collect, marshal, and take custody, control, and possession of all assets of the defendant, wherever located, to satisfy a civil judgment under this subsection, a forfeiture judgment under section 981 or 982, or a criminal sentence under section 1957 or subsection (a) of this section, including an order of restitution to any victim of a specified unlawful activity.

(B) Appointment and authority.--A Federal Receiver described in subparagraph (A)--

(i) may be appointed upon application of a Federal prosecutor or a Federal or State regulator, by the court having jurisdiction over the defendant in the case;

(ii) shall be an officer of the court, and the powers of the Federal Receiver shall include the powers set out in section 754 of title 28, United States Code; and

(iii) shall have standing equivalent to that of a Federal prosecutor for the purpose of submitting requests to obtain information regarding the assets of the defendant--

(I) from the Financial Crimes Enforcement Network of the Department of the Treasury; or

(II) from a foreign country pursuant to a mutual legal assistance treaty, multilateral agreement, or other arrangement for international law enforcement assistance, provided that such requests are in accordance with the policies and procedures of the Attorney General.

(c) As used in this section--

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or

foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;

(6) the term "financial institution" includes--

(A) any financial institution, as defined in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder; and

(B) any foreign bank, as defined in section 1[1] of the International Banking Act of 1978 (12 U.S.C. 3101);

(7) the term "specified unlawful activity" means--

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving--

(i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);

(ii) murder, kidnapping, robbery, extortion, destruction of property by means of explosive or fire, or a crime of violence (as defined in section 16);

(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978))[2] ;

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[1] So in original. Probably should read "section 1(b)".

[2] So in original. The second closing parenthesis probably should not appear.

(iv) bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official;

(v) smuggling or export control violations involving--

(I) an item controlled on the United States Munitions List established under section 38 of the Arms Export Control Act (22 U.S.C. 2778); or

(II) an item controlled under regulations under the Export Administration Regulations (15 C.F.R. Parts 730-774); or

(vi) an offense with respect to which the United States would be obligated by a multilateral treaty, either to extradite the alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States;

(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

(D) an offense under section 32 (relating to the destruction of aircraft), section 37 (relating to violence at international airports), section 115 (relating to influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member), section 152 (relating to concealment of assets; false oaths and claims; bribery), section 215 (relating to commissions or gifts for procuring loans), section 351 (relating to congressional or Cabinet officer assassination), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 541

(relating to goods falsely classified), section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 831 (relating to prohibited transactions involving nuclear materials), section 844(f) or (i) (relating to destruction by explosives or fire of Government property or property affecting interstate or foreign commerce), section 875 (relating to interstate communications), section 922(1) (relating to the unlawful importation of firearms), section 924(n) (relating to firearms trafficking), section 956 (relating to conspiracy to kill, kidnap, maim, or injure certain property in a foreign country), section 1005 (relating to fraudulent bank entries), 1006[3] (relating to fraudulent Federal credit institution entries), 1007[3] (relating to fraudulent Federal Deposit Insurance transactions), 1014[3] (relating to fraudulent loan or credit applications), section 1030 (relating to computer fraud and abuse), 1032[3] (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution), section 1111 (relating to murder), section 1114 (relating to murder of United States law enforcement officials), section 1116 (relating to murder of foreign officials, official guests, or internationally protected persons), section 1201 (relating to kidnapping [sic]), section 1203 (relating to

[3] So in original. Probably should be preceded by "section".

hostage taking), section 1361 (relating to willful injury of Government property), section 1363 (relating to destruction of property within the special maritime and territorial jurisdiction), section 1708 (theft from the mail), section 1751 (relating to Presidential assassination), section 2113 or 2114 (relating to bank and postal robbery and theft), section 2280 (relating to violence against maritime navigation), section 2281 (relating to violence against maritime fixed platforms), section 2319 (relating to copyright infringement), section 2320 (relating to trafficking in counterfeit goods and services), section 2332 (relating to terrorist acts abroad against United States nationals), section 2332a (relating to use of weapons of mass destruction), section 2332b (relating to international terrorist acts transcending national boundaries), or section 2339A or 2339B (relating to providing material support to terrorists) of this title, section 46502 of title 49, United States Code, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), section 422 of the Controlled Substances Act (relating to transportation of drug paraphernalia), section 38(c) (relating to criminal violations) of the Arms Export Control Act, section 11 (relating to violations) of the Export Administration Act of 1979, section 206 (relating to penalties) of the International Emergency Economic Powers Act, section 16 (relating to offenses and punishment) of the Trading with the Enemy Act, any felony violation of section 15 of the Food Stamp Act of 1977 [7 U.S.C.A. § 2024] (relating to food stamp fraud) involving a quantity of coupons having a value of not less than $5,000, any violation of section 543(a)(1) of the Housing Act of 1949 [42 U.S.C.A. § 1490s(a)(1)] (relating to equity skimming), any felony violation of the Foreign Agents

Registration Act of 1938, or any felony violation of the Foreign Corrupt Practices Act;

(E) a felony violation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.), the Act to Prevent Pollution from Ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.); or

(F) any act or activity constituting an offense involving a Federal health care offense;

(8) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General. Violations of this section involving offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement

Investigations Center of the Environmental Protection Agency.

(f) There is extraterritorial jurisdiction over the conduct prohibited by this section if--

(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000.

(g) Notice of conviction of financial institutions.--If any financial institution or any officer, director, or employee of any financial institution has been found guilty of an offense under this section, section 1957 or 1960 of this title, or section 5322 or 5324 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution.

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

(i) Venue.--(1) Except as provided in paragraph (2), a prosecution for an offense under this section or section 1957 may be brought in--

(A) any district in which the financial or monetary transaction is conducted; or

(B) any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the

proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted.

(2) A prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought in the district where venue would lie for the completed offense under paragraph (1), or in any other district where an act in furtherance of the attempt or conspiracy took place.

(3) For purposes of this section, a transfer of funds from 1 place to another, by wire or any other means, shall constitute a single, continuing transaction. Any person who conducts (as that term is defined in subsection (c)(2)) any portion of the transaction may be charged in any district in which the transaction takes place.

18 U.S.C. 1957 (2000)

§ 1957 Engaging in monetary transactions in property derived from specified unlawful activity

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

(b)(1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both.

(2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the

amount of the criminally derived property involved in the transaction.

(c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.

(d) The circumstances referred to in subsection (a) are--

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General.

(f) As used in this section--

(1) the term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument

(as defined in section 1956(c)(5) of this title) by, through, or to a financial institution (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956(c)(4)(B) of this title, but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution;

(2) the term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense; and

(3) the term "specified unlawful activity" has the meaning given that term in section 1956 of this title.

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IN THE

Supreme Court of the United States

DAVID WHITFIELD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

HAYWOOD EUDON HALL a/k/a DON HALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* [1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization, and awards it full representation in its House of Delegates. The NACDL was founded in 1958 to promote research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. The NACDL's objectives include furthering the proper administration of justice and ensuring that criminal statutes are properly construed and applied in accordance with the United States Constitution. One of the NACDL's particular concerns is to ensure that the criminally accused and suspected are not subjected to the kind of prosecutorial overreaching to which the Eleventh Circuit's interpretation of the statute in this case lends itself.

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1. Each party's blanket consent to *amicus* submissions has been filed with the Clerk of the Court. No counsel for a party wrote this brief in whole or in part, and no person or entity, other than the NYCDL or its members or counsel, has made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

Amicus adopts the statement of the case reflected in petitioners' brief.

SUMMARY OF ARGUMENT

If the commission of an overt act is not an element of 18 U.S.C. §1956(h), which punishes conspiracies to violate both 18 U.S.C. §1956 and 18 U.S.C. §1957, two or more persons who contemplate committing specified unlawful activity generating proceeds, would *ipso facto* be guilty of conspiracy to engage in monetary transactions, a broadly defined term, involving criminally derived property, in violation of §§1956(h) and 1957, because virtually any monetary transaction involving such proceeds will violate §1957. Without an overt act requirement, there would be no limiting principle that would distinguish the commission of the specified unlawful activity from the commission of conspiracy to violate §1957.

Moreover, imposing an overt act requirement in conspiracy prosecutions under §1956(h) would not burden the government. Instead, it would merely harmonize §1956(h) and 18 U.S.C. §371, under which money laundering conspiracies traditionally were prosecuted, while providing some indication that the conspiracy is still at work and the prosecution timely, the traditional and important purposes of the overt act requirement in conspiracy law. Indeed, without an overt act requirement,

conspiracy to commit money laundering would give federal prosecutors unbridled discretion to bring such prosecutions whenever and wherever they choose, implicating constitutional due process principles and concerns.

Conspiracies to commit violations of §1956 or §1957 are extremely serious offenses. Before a defendant can be convicted and punished for such a conspiracy, the Court should determine that Congress plainly and unequivocally intended to relieve the government of the obligation to plead and prove an overt act. Far from demonstrating that intention with the requisite clarity, Congress has in fact demonstrated an intent to impose an overt act requirement in the context of conspiracy to commit money laundering or money spending offenses.

ARGUMENT

By its terms, 18 U.S.C. §1956(h) punishes both conspiracies to violate the federal money laundering statute, 18 U.S.C. §1956, and the statute prohibiting engaging in monetary transactions in criminally derived property. 18 U.S.C. §1957.[2] The "only *mens rea* requirement [for a §1957 offense] is 'knowledge' of the prior criminal conduct that tainted the property involved in the proscribed activity." *United States v. Gabriele*, 63 F.3d 61, 65 (1st Cir. 1995). By contrast, §1956 contains the additional *mens rea* element of an intent to conceal or promote the specified unlawful activity from which the proceeds derive. As a result, §1957 has been termed a "money spending" statute, and not a money laundering statute. *United States v. Cefaratti,* 221 F.3d 502, 513 n.7 (3d Cir. 2000) ("unlike §1956, §1957 is indeed a money spending statute"); *United States v. Omoruyi*, 260 F.3d 291, 300 n.13 (3d Cir. 2001) ("unlike section 1956(a)(1), section 1957(a) contains neither a promote nor a conceal element"). As one federal court has explained:

> Section 1957 differs from section 1956 in two critical respects: It requires that the property have a value greater than $10,000, but it does not require that the defendant know of a design to conceal aspects of the transaction or that anyone have such a design. Due to the omission of a "design to conceal" element, section 1957 prohibits a wider range of activity than money "laundering," as traditionally understood. The description of [a section 1957 violation] does not speak to the attempt to cleanse dirty money by putting it in a clean form and so disguising it. This statute applies to the most open, above-board transaction. The intent to commit a crime or the design of concealing criminal fruits is eliminated.

United States v. Allen, 129 F.3d 1159, 1165 (10th Cir. 1997) (citations omitted).

Thus, a violation of §1957 is almost necessarily a concomitant of the commission of any specified unlawful activity that generates illicit funds, particularly in view of the broad definition of §1957's element of a "monetary transaction."[3] *See, e.g., United States v. Pretty,* 98 F.3d

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2. §1956(h) provides in relevant part that any person who conspires to commit "any offense defined in this section or section 1957" is subject to the penalties for the underlying substantive offense created by and defined in each section.

3. *See* 18 U.S.C. §1957(f)(1) (monetary transaction "means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in [§1956(c)(5)]) by, through, or to a financial institution (as defined in [§1956]), including any transaction that would be a

(continued...)

1213 (10th Cir. 1996) (use of proceeds of specified unlawful activity to purchase car, apartment complex and house violated §1957); *United States v. Marshall,* 248 F.3d 525, 535 (6th Cir. 2001) (use of proceeds to open brokerage account makes out §1957 offense).

The already disturbing breadth of §1957 is exponentially expanded, however, if no overt act is required to commit a conspiracy to violate §1957, in violation of 18 U.S.C. §1956(h). Without an overt act requirement, two or more defendants who plan to commit specified unlawful activity generating proceeds almost by definition will also be conspiring to commit a §1957 offense, unless of course they plan to commit a crime just for the fun of it and to hide the proceeds under the mattress for all eternity.

In other words, omitting an overt act requirement from §1956(h) would impermissibly blur the distinction between the specified unlawful activity and the money spending conduct punished by §1957, which is intended to deprive the wrongdoer of the financial benefit of his crime by punishing the spending or knowing receipt of the proceeds. *See* H.R. Rep. No. 855, 99th Cong., 2d Sess. 13-14 (1986). Indeed, the Court has recognized that both §1956 and §1957 are "after-the-fact" offenses committed with the proceeds generated by consummated specified unlawful activity. *United States v. Cabrales,* 524 U.S. 1, 7

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3. (...continued)
financial transaction under [§1956(c)(4)(B)]").

(1998). *See also United States v. Lee,* 232 F.3d 556, 559 (7th Cir. 2000) ("For a section 1957(a) conviction to be proper, 'criminally derived property' must first have existed, and then at a later time, the charged party must have attempted to bring about or have actually brought about a transaction with it"); *United States v. Piervinanzi,* 23 F.3d 670 (2d Cir. 1994) (reversing §1957 conviction because defendants had not taken possession of the fraudulently obtained proceeds until after the charged §1957 transaction).

Interpreting the statute to require not simply the conspiratorial agreement to spend the proceeds of criminal activity, but the pleading and proof of an overt act in furtherance of that agreement, would solve this serious problem that Congress never contemplated or intended. An overt act requirement would help to identify the offense (i.e., specified unlawful activity versus money spending) furthered by the conduct, and sharpen the lines between the specified unlawful activity and the after-the-fact money laundering or money spending conduct, thereby furthering Congressional intent.

The position of the NACDL is not affected or altered by *United States v. Shabani,* 513 U.S. 10 (1994). The opposite is true. Both before and after *Shabani,* Congress reflected its intent to impose an overt act requirement for conspiracy to commit money laundering

and money spending offenses.[4] In view of this legislative history, reflecting a clear and consistent Congressional intent to require pleading and proof of an overt act in prosecutions for conspiracy to commit money laundering and money spending offenses, it is not surprising that the overwhelming majority of the lower federal courts which have addressed the issue after *Shabani* have concluded

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4. Prior to the 1992 amendment adding the present §1956(h), the government easily prosecuted money laundering and money spending conspiracies under the general federal conspiracy statute, 18 U.S.C. §371, which contains an overt act requirement, and the legislative history to §1956(h) reflects a Congressional purpose merely to increase the penalties for conspiracy to commit money laundering and money spending, not to eliminate the overt act requirement. *See, e.g.*, Conference Report, 138 Cong. Rec. S17,904 (daily ed. Oct. 8, 1992). After *Shabani*, Congress enacted the USA PATRIOT Act to, *inter alia*, identify the circumstances under which venue to prosecute money laundering substantive and conspiracy offenses would lie in the district where the specified unlawful activity was committed. In so doing, however, Congress clarified that venue would also lie where an overt act ("an act in furtherance of the attempt or conspiracy") was committed. Pub. L. 107-56, §1004, 115 Stat. 308, 392-93 (Oct. 26, 2001), codified at 18 U.S.C. §1956(I)(2).

that the conspiracy offense codified in §1956(h) requires pleading and proof of an overt act.[5]

Overt acts play a critically important role in conspiracy prosecutions since they are the only external manifestation of a crime "predominantly mental in composition." *Krulewitch v. United States*, 336 U.S. 440, 447-48 (1949) (Jackson, J., concurring). Overt acts demonstrate that "the conspiracy is at work, and is neither a project still resting solely in the minds of the conspirators, nor a fully completed operation no longer in

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5. *See, e.g., United States v. Evans,* 272 F.3d 1069, 1082 (8th Cir. 2001); *United States v. Wilson*, 249 F.3d 366, 379 (5th Cir. 2001); *United States v. Ross,* 190 F.3d 446, 450 (6th Cir. 1999); *United States v. Hildebrand,* 152 F.3d 756, 762 (8th Cir. 1998); *United States v. Navarro,* 145 F.3d 580, 593 (3d Cir. 1998); *United States v. Emerson,* 128 F.3d 557, 561 (7th Cir. 1997); *United States v. Olson,* 76 F.3d 393, 1995 WL 743845, at *2 (10th Cir. Dec. 15, 1995); *see also United States v. Cline,* 2002 WL 1162424 (D. Kan. 2002) (dismissing money laundering conspiracy on Rule 29 motion for failure to plead overt act); *but see United States v. Tam*, 240 F.3d 797, 802 (9th Cir. 2001). The Second Circuit has twice explicitly left this question open and undecided. *United States v. Henry*, 325 F.3d 93, 103 n.6 (2d Cir. 2003); *United States v. LaSpina*, 299 F.3d 165, 173 n.2 (2d Cir. 2002). Apparently the Fourth Circuit has as well. *United States v. Goodwin,* 272 F.3d 659, 669 n.9 (4th Cir. 2001).

existence." *Yates v. United States,* 354 U.S. 298, 334 (1957) (citations omitted). In view of the importance of overt acts in conspiracy prosecutions, this Court should require Congress to manifest its intent to relieve the government of an overt act requirement in the clearest possible terms. Here, far from demonstrating a clear intent to relieve the government of an overt act requirement, Congress has in fact manifested an intent to impose an overt act requirement in prosecutions under §1956(h).

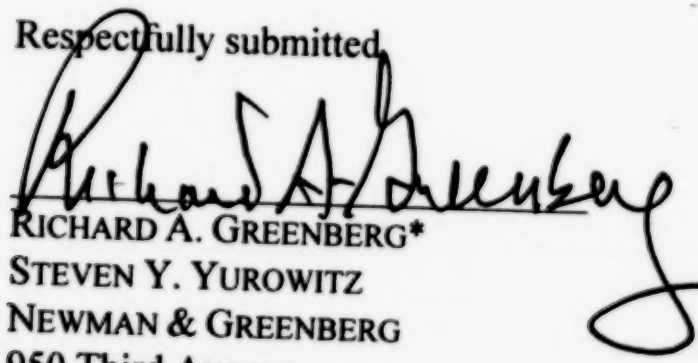
Finally, without an overt act requirement, conspiracy to commit a money spending offense would give federal prosecutors unbridled discretion to bring such prosecutions virtually whenever and wherever they choose. The breadth and dangers of the law of conspiracy have been long noted (*Krulewitch,* 336 U.S. at 445), and §1957 has been described as "draconian" because of its "elimination of criminal intent." *Allen,* 129 F.3d at 1159 (quoting *United States v. Rutgard,* 116 F.3d 1270, 1291 (9th Cir. 1997)). Coupling conspiracy law with the money spending statute is therefore already fraught with the potential for prosecutorial abuse. Relieving the government of the single most important limiting principle in conspiracy law — the pleading and proof of a valid overt act — creates a witches brew of unfettered prosecutorial discretion and inevitable abuse. *See Grayned v. City of Rockford,* 408 U.S. 104, 108-09 (1972) (vague laws "impermissibly delegates basic policy matters" to law enforcement on an *ad hoc* basis).

CONCLUSION

For the reasons set forth above, and for those set forth in petitioners' brief, the judgment of the court of appeals should be reversed.

Dated: New York, New York
August 25, 2004

Respectfully submitted,



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